90-839

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do principles of federalism under the Tenth Amendment permit a judicial reading of the Fair Labor Standards Act which imposes massive back pay liability and future costs, in the absence of a clear indication Congress intended such a result?

2. Should *Garcia v. San Antonio Metropolitan Transit Authority* be overruled?

PARTIES TO THE PROCEEDING

All parties are listed in the caption to this Petition.

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No. _____

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This matter involves the continued existence of civil service as it has evolved in the several states and local entities, and presents a potential for bankrupting many local public entities. Therefore Petitioner, COUNTY OF KERN (herein "Kern County"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered July 11, 1990. Petitioner requests that, if a writ is not granted, summary reversal be granted. At a minimum,

this matter warrants a grant of the writ, vacation of the Opinion below, and a remand.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 908 F.2d 483 (9th Cir. 1990) and is printed in Appendix A, attached hereto. The Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of California, No. CV-F-86-533 MDC (May 31, 1988) and the Judgment of the District Court, No. CV-F-86-533 MDC (July 18, 1988) are unreported and are attached hereto in Appendix C.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) was entered on July 11, 1990. A timely petition for rehearing was denied on August 31, 1990 (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Tenth Amendment of the United States Constitution provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people."

2. 29 U.S.C. § 207.
3. 29 U.S.C. § 213.
4. 29 C.F.R. § 541.1
5. 29 C.F.R. §§ 541.101 - 541.119.

STATEMENT OF THE CASE

This case involves the availability of the "bona fide executive" exemption from Fair Labor Standards Act coverage to public employers in the civil service environment. Under the Ninth Circuit's application of the "Salary Test" to public employment, it appears that no civil service employee in Kern County or most other public entities would be exempt. Kern County's fiscal exposure to date for potential back overtime pay to the 28 Battalion Chiefs is in the hundreds of thousands of dollars. Extending the principle to those classed as executives by the County, which has a total work force of about 7,000 people, would likely bankrupt the County. Extending the Ninth Circuit's holding to other municipalities, counties and states would cripple civil service.

This case originated as a suit brought by Fire Captains and Battalion Chiefs employed by the Kern County Fire Department (hereafter referred to as "KCFD"). The suit alleged that Petitioner, Kern County, failed to pay overtime (at time and one-half) to the Respondents as required by the overtime provisions of the Fair Labor Standards Act (hereafter referred to as "FLSA"), 29 U.S.C. §§ 201, *et seq*.

The County asserted that Fire Battalion Chiefs were exempt from the overtime provisions of the FLSA, as

they were, and are, bona fide executive employees. After review of Fire Captains' actual functions, the County concluded that Fire Captains as a classification were not exempt, in that not all captains regularly and routinely supervise two or more subordinate personnel, and the case proceeded to trial as to Battalion Chiefs.

To fit within the FLSA's "executive or administrative" exemption, employees must (1) perform administrative and managerial tasks 80% of the time, and (2) be paid on a salary basis in the amount of $250.00 per week or more. Respondents conceded readily their pay substantially exceeds $250.00 per week. The trial court also concluded the duties of Battalion Chiefs were primarily administrative and managerial, and that finding was not reached or disturbed by the appellate court.

Each Battalion consists of several fire stations, and battalion sizes range up to 3,000 square miles. A few Battalion Chiefs are assigned to special units and work a 40-hour week, still performing supervisory and administrative tasks. Structurally, there is a Fire Chief, four Deputy Chiefs, 28 Battalion Chiefs and 481 subordinate personnel. These facts clearly demonstrate the managerial function of Battalion Chiefs. As of July 1, 1989, the base pay of Battalion Chiefs as established by County Ordinance ranged from $40,536.00 to $49,476.00 plus fringe benefits.

ARGUMENT

I.

In the Absence of Clear Congressional Intent, Public Employers Should Not be Subjected to Intrusive Policy Changes, Monetary Burdens and Retroactive Liability

The court below gave no consideration to the impact of its ruling on the functioning of our federal system. Its lack of attention to federalism as required by the Tenth Amendment is remarkable in light of this Court's long struggle to reconcile principles of federalism with the FLSA's often extraordinary intrusions into state and local function and decision making. After first upholding application of the Act to some classes of state and local employees (*Maryland v. Wirtz* (1968) 392 U.S. 183), then eight years later striking it down as a Tenth Amendment violation (*National League of Cities v. Usery* (1976) 426 U.S. 833), the Court has most recently permitted the application of FLSA to state and local governments (*Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528).

In reaching this result the *Garcia* Court relied heavily on certain political safeguards to protect federalism. Indeed *Garcia* rests on the premise that Congress, and particularly the Senate, will protect the States' interests against excessive federal governmental intrusion. The Court in *Garcia*, however, identified few political safeguards against Executive intrusions on the states — and none at all against judicial excursions into state and local governments. *Garcia's* rationale therefore requires courts to be extremely reluctant to impose heavy new

burdens on local entities, especially where there is no evidence Congress intended such a result.

Following *Garcia* the legislature quickly acted, in light of the Department of Labor's intention to commence enforcement of the FLSA by November 1, 1985. The 1985 amendments to FLSA were signed by the President November 13, 1985, to forestall imposition of FLSA on state and local governments. *See, Weekly Compilation of Presidential Documents*, November 18, 1985; Vol. 21, No. 46, pp. 1390-1391. A number of bills were introduced that year, ultimately yielding a compromise bill designed to preserve a decent minimum for rank and file workers by a modified and limited application of FLSA to local government employees.

Prior bills, such as S1434 (Wilson) sought to legislatively override *Garcia*. A consensus could not be reached as to complete exemption of local governments from FLSA, hence compromise bills emerged, S1570 and HR3530. After Joint Conference the measure passed, as Public Law 99-150. Significantly, the title given to the enactment specified its purpose as allowing local governments to provide compensatory time off in lieu of monetary payments for overtime, clarifying that volunteer and special assignment hours need not be counted towards overtime, and similar measures intended to reduce the fiscal burden on local governments and provide flexibility in personnel scheduling and management — quite the opposite of what the court below has done.

P.L. 99-150 did not address the "bona fide executive" exemption from FLSA coverage as it relates to public employment. The intent of allowing only a limited application of FLSA to local governments (rather than completely exempting them) clearly appears from the legislative history. Report 99-159, 99th Congress, First

Session (October 17, 1985), page 7, states the need for the Bill (S1570) as follows:

> "In seeking to guarantee a *minimum standard of living for all working Americans*, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1975, FLSA coverage extended to three-fourths of the nation's employed *nonsupervisory* labor force; federal, state and local government employees were the only major exceptions." (Emphasis added.)

The Report acknowledged the special needs of public employment and the role of the states in our federal system. At page 7 of the report, concern was expressed to not "undermine" the position of the states or "unduly burden" them, the Committee seeking to ". . . further the principles of cooperative federalism." Continuing at page 8, the Report cites *Garcia* and the problems which arise under the decision for the states, and seeks to avoid them.

The debates in Congress evinced this purpose, and showed that many senators and representatives continued to question whether FLSA should be applied to the states at all. *See, e.g.*, Congressional Record, S14046-14057, 14095ff, (October 24, 1985); H9236-9243 (October 28, 1985). The consistent message of Congress was that the Act should be applied to assure that *nonsupervisory* state and local government employees would have the same "decent minimum" as the rest of industry, specifically being subject to the minimum wage protection, and entitled to compensation for overtime — but in the form of time off or money, at the local government's option.

The importance of collective bargaining agreements was also affirmed in the Congressional debates, and care taken not to cripple either existing agreements, or to narrow the scope of negotiable items for the future.

In enacting the FLSA initially, and throughout the many subsequent amendments, Congress did not adopt the harsh and unnecessary rule announced by the Court below. To the contrary, Congress very simply exempted "executive and administrative" employees, leaving elaboration of this exemption to the good sense of the courts and Department of Labor.

The lower Court's application of the FLSA does not emanate from Congress, or from the Executive Branch either. The Labor Department's rather sweeping "subject to deduction" test was written originally for private employers, and has not been reconsidered directly since the most recent application of the FLSA to local governments. Thus, no political safeguards could have, or in fact have functioned to protect the values of federalism in applying this test to public employers.

In an effort to ameliorate the problem created, the Department issued a Letter Ruling dated January 9, 1987, which announced the "Salary Test" would not be enforced against public employers where a ". . . state or local law . . ." which prohibits payments for absences which are not covered by accrued leave time was in place prior to April 15, 1985. Kern County cited the State Constitution and its local Ordinance Code section which so required. The Court below dismissed the State Constitutional provision as inapplicable, and never addressed the local ordinance. Thus, even had some "political safeguard" been operative, the Court below has ridden roughshod over it.

The regulations as promulgated by the Labor Department do not, for public or private employers, impose back pay liability for every hourly deduction from pay. Section 541.118(a)(6) provides that an otherwise exempt administrative employee is not transmuted to covered hourly status by virtue of an occasional deduction. Instead, the worker is treated as hourly for the pay period in which the deduction occurred. Only if such deductions are "regular and recurring" would the Department, potentially, conclude the exemption is unfounded. *Id.* This section clearly is intended to give wide latitude to avoid harsh results, even as to private employers. The logic applies with even greater force and constitutional dimension in the public sector.

It therefore appears nothing in the Act or subsidiary regulations requires Kern County Battalion Chiefs be treated as covered. At most, Battalion Chiefs should be treated as covered only for pay periods in which a deduction occurs. So far as the record shows, no Kern County Battalion Chief has actually suffered a deduction. From the standpoints of common sense and public policy therefore, it appears Kern County has established, in its Civil Service System, executive pay and accrual of time off which effectively prevents docking of pay for occasional absences, while preserving solid accountability for the expenditure of tax dollars in salaries. Principles of federalism require those virtues be respected.

For *Garcia*'s view of federalism to survive, the courts must at a very minimum give political safeguards a chance to work. Given the expressed views of Congress in enacting P.L. 99-150 as a compromise measure, the courts should be extremely reluctant to impose liabilities on local governments. This is especially true, where Congress has not clearly intended to impose new

liabilities on the States. *Employees of the Dept. of Pubic Health & Welfare, State of Missouri, et al. v. Dept. of Public Health & Welfare, State of Missouri* (1973) 411 U.S. 279, 284-285. In this case the Supreme Court noted the exceptional caution necessary, when dealing with matters that will affect a broad class of public employees.

The Court below displayed only eagerness to impose new and unwarranted liabilities and policies on public employment. It first declared that ". . . exemptions to FLSA are to be narrowly construed," citing private employment cases. (908 F.2d 485.) On a similar grounding, it then stated counties, lik private employers, "not only have the burden of proof . . . but they must show that the employees fit 'plainly and unmistakenly within [the exemption's] terms.' " (*Id.*, at p. 486.)

In its rush to change the face of public employment and impose retroactive liability, the lower court swept aside — indeed ignored — the impact of its ruling on our federal system. It ignored the absence of Congressional intent (in fact the contrary intent) to impose harsh penalties and restrictive changes on state and local governments. It further ignored the Executive's efforts to avoid imposition of such disabilities. This willful refusal to consider the unique nature and concerns of state and local public employers, as recognized by Congress, runs directly counter to the principles of federalism inherent in the American system of government.

II.

The Lower Court's Ruling Imposes a Substantial Penalty on a Widespread, Reasonable and Necessary Policy of Public Employers

The decision below not only violates federalism; it also runs counter to common sense. Public employers deserve greater leeway in complying with the FLSA, not only because of their constitutional status but also because, as governments, they are subject to constraints not found in the private sector — what may be termed political safeguards for public employees. Public employees are employees, and also constituents. The services they provide are vital and in many cases not available elsewhere, making it a matter of immediate public concern if their compensation and working conditions lead to labor unrest. The absence of a profit motive in the public sector also makes it highly unlikely government employers will endeavor to squeeze every nickel from their employees.

Concurrently, the high visibility of public entities brings special responsibilities. In the absence of profit-and-loss statements, entities and their employees are more often measured by their effort than their output.

Civil service systems have therefore typically evolved a pattern of tightly regulated working hours, in an effort to assure the public it is getting full value for every tax dollar. A part of this process, an integral part of civil service compensation, is accumulation of time off in the form of vacation, sick leave and, in Kern County's case (as with many other entities), compensatory time off for hours in excess of a stated maximum. Conversely, public accountability requires public employees (executive

and labor alike) not waste public funds by failing to work required hours.

This premise is so basic to local autonomous operations that the California Constitution has multiple sections requiring public expenditures be strictly accounted for, including compensation of public employees. The California Constitution, article XI, section 1, subdivision (b) requires the governing bodies of counties to provide for the number, tenure, compensation and appointment of employees. Article IV, section 17 specifically forbids retroactively compensating a contractor, public employee or official. Article XVI, section 16 forbids making a gift of public funds.

Affirming the importance of accountability for expenditures of public funds, the California Attorney General issued an opinion indicating it would be a violation of the State Constitution to increase the pay of a county employee retroactively to the date salary discussions between the public employee and public employer commenced. *See* 65 Ops.Cal.Atty.Gen. 66 (1982). Similarly, a California Appellate Court has ruled it would be unconstitutional to reimburse a school custodian the amount of pay he would have earned during the time between his suspension and dismissal, and his reinstatement to employment. The custodian had been suspended after child molestation charges were brought and a guilty verdict obtained. He was reinstated upon acquittal of the charges at a new trial granted in the case. *Hutton v. Pasadena City Schools* (1968) 261 Cal.App.2d 586, 68 Cal.Rptr. 103.

Against the background of the State Constitution's emphasis on the importance of setting public employees' compensation and accountability for public expenditures, two other considerations emerge. First, it should be noted the Respondents (like many, if not most public

employees) are covered by a collective bargaining agreement. This agreement (and applicable state law, *e.g.*, the Meyers-Milias-Brown Act, Ca. Government Code §§ 3500, *et seq.*) require that, before matters of wages, hours and working conditions may be changed, the public entity and bargaining unit must meet and confer. The Ninth Circuit's ruling abrogates the collective bargaining agreement by in essence granting a retroactive pay award (for past overtime at time and one-half) without altering or reducing other compensation, specifically including management benefits not afforded to hourly employees who in fact are by contract to receive time and one-half pay for overtime. The Respondents have thus been granted a windfall never contemplated in the collective bargaining agreement. A similar result likely awaits other local public entities.

In short, the decision below places a massive liability on public employers who have developed and adopted a reasonable policy to meet the twin concerns of fairness to their employees and accountability to their constituents in the unique circumstances of government service. Whatever ends such harsh penalties may serve in private industry, they have no place in intergovernmental relations. Although Congress could, after *Garcia*, treat local governments that way, it did not do so. The clear import of the 1985 legislation (P.L. 99-150) and the discussions and compromises leading to the final version is that local governments, in the view of Congress, should have wide latitude in the area of wages and hours, being subject only to a "decent minimum" standard at the lower end of the wage spectrum. The courts should respect this expressed viewpoint.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I.

The Decision Below is in Conflict with the Decisions of Other Courts

This issue has sparked division throughout the federal court system. Some courts, as the court below, hold public employers liable for back pay across the board if they maintain a policy that "technically" permits deductions — even where, as in Kern County, no deduction has been made from the pay of the employees who filed suit.

The decision of the Ninth Circuit is consistent with those of some district courts in other circuits. *See, e.g., Banks v. City of North Little Rock* (E.D. Ark. 1988) 708 F. Supp. 1023, 1025 (no showing of actual deductions is needed); *Hawks v. City of Newport News* (E.D. Va. 1988) 707 F. Supp. 212, 215 (if policy for deductions violates FLSA, application to particular group of employees not important); *D'Camera v. District of Columbia* (D.D.C. 1988) 693 F. Supp. 1208, 1212.

The Court of Appeals for the Fourth Circuit heard the same arguments and made a ruling completely opposite from the Ninth Circuit.

In *Hartman v. Arlington County* (4th Cir. 1990) 903 F.2d 290, the Court of Appeals affirmed the decision of the Federal District Court to grant summary judgment in favor of Arlington County, Virginia. The District Court decision is reported at 720 F. Supp 1227 (E.D. Va. 1989). As the Fourth Circuit's Opinion is rather brief, a Memorandum of Law filed by the County of Arlington is reproduced as item "D" in the Appendix.

In the Fourth Circuit case, in contrast with the present case, deductions had actually been made from otherwise exempt personnel for absences of less than one day. In further contrast, Arlington County had reimbursed the employees for those deductions after suit was filed, concurrently with abandoning accountability by hastily enacting a policy of not making deductions after exhaustion of paid leave, retroactive to April 15, 1986. (The date FLSA became applicable to public employers.) The effect of this hasty tactical maneuver is to have a system which strictly accounts for the accumulation and use of time off, but which then, in sham fashion, states that no deductions for absences of less than a day will be made anyway, eviscerating one of the main principles of civil service employee compensation.

The district court in *Hartman* held that under the terms of § 541.118(a)(6) an executive's exempt status would be lost only in those weeks in which unpermitted deductions were made. By making reimbursements, Arlington County had demonstrated compliance with the salary basis test. *Id.*, at 1230. Consequently, the district court concluded "there is no dispute that [fire fighting personnel] are salaried employees." *Id.*

The district court held expressly (720 F. Supp. 1229) that payment of "overtime," in the form of straight time or compensatory time off, did not defeat the exemption, the court citing § 541.118(b) in support. In an extremely short opinion, the Fourth Circuit agreed with the trial court's logic and findings in *Hartman*.

The decision of the Fourth Circuit Court of Appeals is consistent with other federal district court rulings. *See, e.g., International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria* (E.D. Va. 1989) 720 F. Supp. 1230, 1232 (unauthorized deductions made from twenty-six employees, but § 541.118(a)(6) provides

"window of correction"); *Harris v. District of Columbia* (D.D.C. 1989) 709 F. Supp. 238, 241 (otherwise exempt employees not "subject to" unauthorized deductions where no deductions had ever been made, despite policy that "technically" allowed for deductions, similar to Kern County's rules). The maneuvering in these decisions produces situations much like *Hartman*, in that public employers are being unjustifiably forced to abandon traditional civil service rules, structure, checks and balances due to the extremely literal application of the Salary Test being made by some courts.

It is clear, from the variety of interpretations and applications of the FLSA's Salary Test being made in different jurisdictions, that coherent national policy is necessary. It is, as stated, a matter of the degree to which this Court will allow Constitutional principles of federalism to be eroded, in the face of a federal interest in protection of workers which is, as to executives in public employment, unnecessary.

II.

Garcia Should be Reconsidered and Limited or Reversed

As above demonstrated, proper application of the principles enunciated in *Garcia* necessitates reversal of the decision below. The "political safeguards" have been foreclosed by the Ninth Circuit's precipitous opinion, in that the terms on which the FLSA will apply to executive and administrative employees have not been fully considered by the Executive or Legislative Branches. The clear intent and mood of Congress, as shown in P.L. 99-150, is to make a very limited application of FLSA to state and local public entities.

Garcia went far beyond its own facts. In the context of wages and hours for transportation workers, a sweeping application of FLSA to all public employment was announced. While there may be a basis for some application of FLSA, a limit based on principles of federalism, common sense and the traditional practices and values of public employment is required. This may be a balancing of the need, if there is any need, for "protection" of higher-income executive public employees as against the needs of local governments to be accountable for their expenditures, and the need to respect local autonomy in light of the federal structure of our national governmental system.

Or perhaps it is time to squarely face the inconsistent patoir that has complicated and burdened public employment since *Garcia*, and to reverse *Garcia* in its entirety. If Congress desires to apply FLSA to state and local governments on some limited basis, Congress should make that decision and define the extent of application to be made. The present situation, judicially imposing an Act intended to control abuses of employees in private industry to governments, has resulted in constant turmoil, uncertainty and inconsistency.

The energies of state and local governments — and not a little tax money — has been diverted by the need to cope with such inconsistency and uncertainty. Reversing *Garcia* and giving the Legislative and Executive Branches the opportunity to define an appropriate application of FLSA to local government will best serve public policy, and the public as a whole.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted. Alternatively, Petitioner requests summary reversal and reinstatement of the trial court's judgment. As a minimum alternative, Petitioner requests the writ issue, ordering reversal and a remand with directions to the Ninth Circuit.

Dated: November 26, 1990.

Respectfully submitted,

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County Counsel

ROBERT D. WOODS
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Attorneys for Petitioner,
COUNTY OF KERN

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE MCKENZIE, BOB TEMPLE, BARRY SCHULZ, JIM CHAPMAN, BOB TURNER, and STEVE MCLEMORE,
Plaintiffs-Appellants,

v.

COUNTY OF KERN,
Defendant-Appellee.

No. 88-15154
D.C. No. CV-86-0533-EDP
OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted
June 30, 1989—San Francisco, California

Filed July 11, 1990

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Labor

Reversing a judgment of the district court, the court of appeals held that Kern County Battalion Fire Chiefs are not

salaried within the meaning of the Fair Labor Standards Act, 29 U.S.C.§ 541.118(a), and thus are not bona fide executives exempt from the overtime provisions of the FLSA.

Appellants Battalion Chiefs in appellee Kern County Fire Department brought a class action against the County seeking back overtime pay plus interest allegedly due them under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1982), as amended, Publ. Law 99-150 (1985). The FLSA requires employers to provide overtime compensation for hours worked in excess of a prescribed work week. Under the Act, however, bona fide executives are exempt from the FLSA's overtime provisions. At issue in this case was whether the Battalion Chiefs whose pay is subject to deduction for absences of less than a day are paid on a salary basis according to the regulations of the FLSA. The district court ruled that the Battalion Chiefs are bona fide execu... and are therefore not entitled to relief. The Battalion Chiefs appealed.

[1] In order to be considered bona fide executives exempt from the minimum wage provisions of the FLSA, an employee must be paid on a salary rather than on an hourly basis. In order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day. [2] There was no dispute in this case that the pay of the Battalion Chiefs is subject to reduction for absences of less than a day. A Battalion Chief who did not have accrued paid or compensatory leave in a given pay period would, under Kern County rules, have his pay docked on an hourly basis for any time he is tardy or absent from work. This scheme of compensation does not comport with the requirements of the FLSA. [3] The court's conclusion that the Battalion Chiefs are not paid on a salary basis was supported by the overtime policy for the Battalion Chiefs, who receive overtime pay or compensatory time off for every tenth of an hour which they work outside of their regularly scheduled hours of duty. [4] The County argued that Battalion Chiefs are salaried even

though their pay is admittedly subject to deductions for part days missed because no such deductions have ever actually been made. The dispositive factor is that under the County's policy, the employee's pay is at all times subject to deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. Battalion Chiefs' pay is contingent. The regulations do not require that a deduction for an absence of less than half a day actually have been made, but only that an employee's pay is subject to such a deduction. The deductions provided for by the County's policy meet the "subject to" standard, and that is all the regulations require.

COUNSEL

Duane W. Reno, David, Reno & Courtney, San Francisco, California, for the plaintiffs-appellants.

B. C. Barmann, County Counsel, Robert D. Woods, Chief Deputy - Litigation, County of Kern, Bakersfield, California, for the defendant-appellee.

OPINION

REINHARDT, Circuit Judge:

At issue in the instant appeal is whether employees whose pay is subject to deduction for absences of less than a day are paid "on a salary basis" according to the regulations implementing the Fair Labor Standards Act. We conclude that they are not, and that therefore such employees are not "bona fide executives" exempt from the protections of the Act.

Appellants, Battalion Chiefs in the Kern County Fire Department ("Department"), brought a class action against

Kern County ("County") seeking back overtime pay plus interest allegedly due them under the overtime provisions of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201, *et. seq.* (1982), as amended, Pub.L. 99-150 (1985). The FLSA requires employers to provide overtime compensation for hours worked in excess of a prescribed work week. 29 U.S.C. § 207. Under the Act, however, "bona fide executives" are exempt from the FLSA's overtime provisions. 29 U.S.C. § 213(a)(1). After a bench trial, the district court ruled that the Battalion Chiefs are "bona fide executives" and are therefore not entitled to relief. The Battalion Chiefs appeal. We reverse.

The administrative regulations promulgated pursuant to the FLSA establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. § 541.1 (a-e) (1988); 29 C.F.R. § 541.1(f)(1988). Generally, in order to claim an exemption, an employer must prove that the employee meets *both* tests. Here, the district court concluded that the Battalion Chiefs met both. In the alternative, the court ruled that the salary test does not apply to the Battalion Chiefs. It based this conclusion on a Department of Labor letter ruling which held that the salary test is inapplicable to persons covered by a state or local law that precludes payment of regular compensation to absent public employees. Because we find that the court erred both in concluding that the appellants met the salary test and in determining in the alternative that the salary test is inapplicable, we need not decide whether appellants satisfy the criteria set out in the duties test.

The essential facts are not in dispute. The County concedes that the Department is an employer subject to the FLSA and has been so since April 15, 1986. The ranks held by employees in the Department, and the number of employees in each rank, are as follows: Chief (1), Deputy Chief (4), Battalion Chief (28), Captain (171), Engineer (193), Firefighter (111), and Heavy Equipment Operator (6). The majority of employ-

ees who perform fire suppression duties are "56-hour fire duty" employees, whose work schedules commence at 8:00 a.m. and conclude at 8:00 a.m. two days later, for a scheduled duration of 48 hours. These employees are scheduled to work 144 hours during each 18-day cycle. Of the 28 Battalion Chiefs: 21 are permanently assigned to particular battalions; three are assigned to provide relief duty for other Battalion Chiefs who are temporarily absent; and one is assigned to each of the following units — Training, Arson, Fire Prevention, and Hazardous Material Control. With the exception of the Battalion Chiefs assigned to Training, Arson, Fire Prevention, and Hazardous Material Control, all of the Battalion Chiefs are "56-hour fire duty" employees. The others are "40-hour safety" employees.

The district court found that Battalion Chiefs are paid an amount expressed and computed as a biweekly salary and that their pay exceeds $250.00 per week. The parties have stipulated that the pay of Battalion Chiefs is subject to a potential deduction for absences from work of less than a day's duration if the absence cannot be "covered" or paid as vacation, sick leave, or accrued compensatory time off. There does not appear to be any evidence that such a deduction has in fact ever been made. The parties have also stipulated that Battalion Chiefs are paid overtime "for each tenth of an hour that they work outside of their regularly scheduled work shifts." However, appellants are only paid their usual hourly rates rather than time and one-half for their attendance at training activities outside of their work shifts, and this is one of the parties' major points of contention. Finally, the County concedes that Department personnel who are not "bona fide executives" and who have work periods of 18 days must be paid at the rate of time and one-half for all hours worked in excess of 136 hours during any such work period.[1] The forty-

[1]The Department "has elected to avail itself" of the provisions of 29 U.S.C. § 207(k), which deals specifically with the calculation of maximum hours for firefighters and police, by declaring an 18-day work week for its fire protection personnel. Subsection 207(k) provides:

hour employees who are not "bona fide executives" must, of course, be paid overtime after forty hours.

The principles governing our review are well established. Exemptions to FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959); Employers who claim that an exemption applies to their employees not only have the burden of proof, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), but they must show that the employees fit "plainly and unmistakenly within [the exemption's] terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Moreover, since a determination of the Battalion Chief's salary status

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(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if —

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

requires an application of the facts to the law, our standard of review is *de novo*. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

[1] As noted above, in order to be considered a "bona fide executive" exempt from the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), an employee must be paid on a salary basis rather than on an hourly basis. In distinguishing these two methods of compensation, the regulations implementing the FLSA provide that:

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of the work performed.* Subject to the exceptions provided below, *the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.*

29 C.F.R. § 541.118(a) (emphasis added). In order to satisfy the salary test, an employee's pay cannot be *subject to* deductions for absences of less than a day. The Department of Labor has stated that "deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3)." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986. The only court of appeals to have considered this question has also concluded that "[a] salaried professional employee may not be docked pay for fractions of a day of work missed." *Donovan v. Carls Drug Co., Inc.*, 703 F.2nd 650, 652 (2nd Cir. 1983). Subjecting an employee's pay to deductions for absences of less than a day,

including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the . . . quantity of work performed" — especially when hourly increments are at issue.

[2] There is no dispute in this case that the pay of Kern County's Fire Battalion Chiefs is subject to reduction for absences of less than a day. A Battalion Chief who did not have accrued paid or compensatory leave in a given pay period would, under Kern County's rules, have his pay docked on an hourly basis for any time that he is tardy or absent from work. If a Battalion Chief took four hours of vacation or compensatory time off from work during a pay period but had only accrued three hours of vacation or compensatory time, his pay for that period would be reduced by one hour. This scheme of compensation simply does not comport with the requirements of section 541.118(a).

[3] Our conclusion that appellants are not paid on a salary basis is supported by the overtime policy for Battalion Chiefs. Battalion Chiefs receive overtime pay or compensatory time off for every tenth of an hour which they work outside of their regularly scheduled hours of duty. Thus, when a Battalion Chief attends meetings within the fire department or stays past the scheduled end of his shift to continue fighting a fire or to fill out a report, he receives additional compensation. Compensatory time off is provided on an hour-by-hour basis; thus a Battalion Chief who works one hour of overtime will receive one hour of compensatory time off. Such additional compensation for extra hours worked is also not generally consistent with salaried status. *See Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3rd Cir.), *cert. denied sub*

nom. Claridge Hotel and Casino v. McLaughlin, 109 S. Ct. 307 (1988); *Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988).[2]

[4] The County argues that Battalion Chiefs are "salaried" even though their pay is admittedly subject to deductions for part days missed because no such deductions have ever actually been made. That fact, however, is both misleading and irrelevant. That Battalion Chiefs will generally accrue sufficient compensatory or leave time to avoid an actual reduction in their take-home pay does not change the fact that deductions from pay based on hourly attendance are explicitly provided for under the County's policy. The policy provides, in effect, that the deductions shall be made first from accrued compensatory or leave time and then from the employee's base pay. However, whether the employee's base pay is the first or second source for recoupment of monies paid for hours missed is of no significance for purposes of section 541.118(a). The dispositive factor is that under the County's policy, the employee's pay is at all times "*subject to*" deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. Battalion Chiefs' pay is contingent. Section 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an

[2]Although the salary status of Deputy Chiefs and the Fire Chief is not at issue in this case, the emphasis on hours worked for Battalion Chiefs is even more apparent when the treatment of Battalion Chiefs is contrasted with the treatment of Deputy Chiefs (and the Fire Chief). Deputy Chiefs are not required to report absences of a short duration and thus will not have such absences charged against accrued leave time or deducted from their salary. Similarly, their salary is *not* subject to deduction for tardiness. Nor do Deputy Chiefs receive overtime pay or even compensatory time off for hours worked beyond their normal work hours. Thus, if a Deputy Chief worked beyond his regularly scheduled hours to fill out a report, he would not receive extra time off. Only under special circumstances might he receive compensatory time — for example, if a large fire required his presence outside of his normal work hours; even in such an instance, however, the compensatory time would be measured loosely, not balanced hour-by-hour.

employee's pay be "*subject to*" such a deduction.[3] That, it clearly is. In short, the deductions provided for by the County's policy meet the "subject to" standard and that is all that the regulations require.[4]

The County also argues that a January 15, 1986 Wage and Hour Division Letter Ruling supports its position that the Battalion Chiefs are "salaried" employees. A paragraph near the end of the letter ruling states:

> Where an occasional deduction that is not permitted

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[3]In fact, a strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as "salaried." However, we need not decide that question here.

[4]Although no circuit courts have yet faced the question, a majority of district courts that have addressed it have held that employees whose pay is "subject to reduction" for such absences are not salaried, even if no deductions have actually been made. *See, Banks*, 708 F. Supp. at 1025 (no showing of actual deductions is needed); *Hawks v. City of Newport News, Virginia*, 707 F. Supp. 212, 215 (E.D. Va. 1988) ("[I]t is the defendant's policy which is under attack in a suit brought under the FLSA. The fact that the policy has not been applied to a particular group of employees does not alter the policy itself."); *Persons v. City of Gresham, Oregon*, 704 F. Supp. 191, 194 (D. Or. 1988) (that employees did not allege any instance in which county had reduced pay of employee who had no accrued leave for an absence of less than a day did not alter the fact that their pay was "subject to" such deductions); *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1988) ("[T]he test under 29 C.F.R. § 541.118(a) is whether a sergeant's paycheck is 'subject to reduction,' not the frequency with which a sergeant's pay is so reduced."); *Knecht v. City of Redwood*, 683 F. Supp. 1307 (N.D. Cal. 1987) ("That no Fire Captain has actually had his pay reduced as a result of a short-term absence since April 15, 1986 does not alter the undisputed fact that Fire Captains' pay checks are 'subject to reduction' for such absences."); *but see Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (declining "plaintiffs' invitation to declare them eligible for overtime compensation at this stage of the proceeding" because, since no unauthorized deduction has actually been made, the court is unable to analyze the facts and circumstances surrounding such a deduction).

> is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid 'on a salary basis' and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The County interprets this letter ruling as saying that whether or not employees' base pay is subject to deductions, the employees only lose their salary status for the specific weeks in which an employer actually makes a deduction not permitted by section 541.118(a). The letter ruling responded to a request by certain counties for an opinion as to whether they were compensating their employees on "a salary basis." The counties had a policy of reducing employees' pay for absences due to illness of less than a day but only when an employee had already exhausted all earned sick leave. Thus the policy presented precisely the same legal question as does the policy before us. The counties requesting the letter ruling asked specifically whether the deductions provided for in their policies could be made under the Department's regulations. The Deputy Administrator responded that they could not, and that an employee whose pay was reduced pursuant to those policies would not meet the criteria for a salaried employee exempt from the FLSA provisions. At the end of the letter ruling, after answering the counties' question in the negative, the Deputy Administrator added the ambiguous paragraph on which the County relies.

Although the Deputy Administrator's statement that an occasional unpermitted deduction would not change an individual's overall salary status appears at first glance to provide some support for the County's view, the statement would make little sense if deemed applicable to an employer's general policy providing for unpermitted deductions as a matter of course. The purpose of the statement was quite to the con-

trary. It was to ensure that an employer is not permanently penalyzed for an inadvertent or unintentional deduction. Where there is an occasional deduction made because of an error on the part of a government entity or because of an individual decision by a supervisor, there is good reason to say that the affected employee's status will be changed only for the week in which the unpermitted deduction was made. *Cf.* § 541.118(a)(6) (where individual error made and corrected). But where an employer deliberately adopts a policy rendering employees' pay "*subject to*" deductions for unpermitted reasons, the frequency with which an employer is forced to apply that policy is irrelevant. If there is any cause to determine the frequency with which an employer makes unpermitted deductions, it is only to help in determining whether such a policy exists (causing the Department to "question whether the employee is actually paid 'on a salary basis' "). Here there is no question that the County's policy provides for such deductions.

To read the letter ruling differently would be to write the "subject to" language out of the Department's regulations. It is unlikely that the Deputy Administrator in a casual paragraph added after completing his answer to the counties' question — a paragraph that does not even mention the "subject to" provision — intended to make so drastic a change in the regulations. Nor, even if that were the Deputy Administrator's intention, could he have effectively done so, for an Administrator's letter ruling cannot override the express provisions of a Department of Labor regulation.

For similar reasons, we reject any suggestion that subsection (6) of section 541.118(a) is applicable to the present case. The complete text of subsection 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available,

> it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Once again, the thrust behind the regulations is to facilitate the determination whether an employer has a general *policy* of deducting for absences of less than a day or whether a deduction is made as a result of inadvertence or error. The exception in subsection (6) is for an employer that makes a one-time improper deduction and then corrects its error. This provision is of no relevance in the case of an employer that, like the County of Kern, has adopted an express policy of deducting for part-day absences when an employee has no accrued leave, and has continued to adhere to such a policy.

Finally, the County argues that even if appellants cannot be considered "salaried" under the regulations, the salary test is inapplicable to the Kern County Battalion Chiefs in light of Article XVI, section 6 of the California Constitution. In a January 9, 1987 Letter Ruling, the Wage and Hour Division announced that it would not apply the salary test to public employees "where the public employer can show that a provision contained in the applicable state or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) . . . which are not covered by available paid leave." The County contends that Article XVI, section 6, is such a provision. In ruling in the alternative that the salary test does not apply to the Battalion Chiefs, the district court apparently accepted this argument. It erred in doing so.

Article XVI, section 6 of the California Constitution provides that the Legislature shall not "have power to make any

gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." There is neither any authority nor any logic to support a holding that a general constitutional provision like Article XVI, section 6, which on its face simply bars gifts of public funds, constitutes a requirement that a deduction be made from the compensation of any salaried public employee who takes an hour or so off from work. With the exception of the district court below, no court, state or federal, in the long history of Article XVI and its predecessors has drawn the conclusion that the California Constitution's prohibition against gifts of public funds mandates the reduction of state employees' pay for absences from work.

The unique suggestion that the California Constitution precludes the state from paying any state employee, including the Governor, a full salary without making deductions for an extra long lunch hour or time off during work to get a haircut, is simply untenable. In fact, the California Constitution's prohibition against gifts of public funds is designed to ensure that public monies are expended for public, rather than private, purposes. Numerous California cases interpreting this provision have held that, where money is spent for a public purpose, "the appropriation is not a gift even though private persons are benefited by the expenditure." *Los Angeles County v. Fuentes*, 20 Cal. 2d 870, 877, 129 P.2d 378, 382 (1942), *cert. denied*, 317 U.S. 698 (1943). In the case before us, not only is the purpose public, but also the benefited employees. California courts have repeatedly recognized that the payment of salaries and employment benefits to government employees in order to remain competitive in the labor market with private companies constitutes a legitimate public purpose. *See, e.g., San Joaquin County Employee's Association, Inc. v. County of San Joaquin*, 39 Cal. App. 3d 83, 86, 113 Cal. Rptr. 912, 914 (1974); *Jarvis v. Cory*, 28 Cal. 3d 562, 578 n.10, 620 P.2d 598, 607 n.10 (1980) (*en banc*). Nothing in private or public employment law suggests that a "bona fide executive" must punch a time clock, nor that he must suf-

fer a pay-deduction if he is late for work or occasionally uses a small portion of his time to take care of personal necessities, and we see no reason to construe Article XVI, section 6 of the California Constitution as proclaiming so odd a policy. The January 1987 letter ruling is therefore not a reason to hold that the salary test does not apply to the Kern County Battalion Chiefs.

For the above reasons, we hold that the appellants are not "salaried" within the meaning of section 541.118(a) and thus are not "bona fide executives" exempt from the provisions of the FLSA.

REVERSED AND REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAN ABSHIRE, DENNIS CARROLL,
LARRY FRANK, BILL RICKMAN,
TOM BLACKMON, RICHARD PELLERIN,
BILLIE McKENZIE, BOB TEMPLE,
BARRY SCHULTZ, JIM CHAPMAN,
BOB TURNER, and STEVE McLEMORE,
Plaintiffs-Appellants,

v.

COUNTY OF KERN,
Defendant-Appellee

No. 88-15154
D.C. No. CV-86-0533-EDP
ORDER

Before: TANG, REINHARDT and WIGGINS,
Circuit Judges

Appellee's petition for rehearing is DENIED.

APPENDIX C

B. C. BARMAN, COUNTY COUNSEL
COUNTY OF KERN, STATE OF CALIFORNIA
By Robert D. Woods, Chief Deputy-Litigation
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Attorney for COUNTY OF KERN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAN ABSHIRE, et al.,
Plaintiff,
vs.
THE COUNTY OF KERN,
Defendants.

NO. CV-F 86-533 MDC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The captioned matter came on regularly for trial before the Honorable Myron D. Crocker, United States District Judge, commencing May 3, 1988. Appearances

by Duane N. Reno, Esq. of Davis, Reno & Courtney, San Francisco, Ca. for the Plaintiffs, and Robert D. Woods, Esq., Chief Deputy County Counsel-Litigation, Bakersfield, Ca. on behalf of Defendant County of Kern. The case proceeded without jury.

Having heard and considered the oral and documentary evidence, the arguments of Counsel and pertinent laws, the following was established to the Court's satisfaction.

1.

FINDINGS OF FACT

1. The primary duty of Battalion Chiefs in the Kern County Fire Department ("KCFD") is management of a customarily recognized subdivision of the KCFD, to wit a fire battalion.

2. Battalion Chiefs regularly and routinely supervise, direct and review the work of more than two other KCFD employees.

3. Battalion Chiefs perform evaluations of their subsidiary Fire Captains, and review, approve and comment upon evaluations of Fire Fighters and Engineers made by their subsidiary Fire Captains. The KCFD and the County of Kern give weight to and rely upon these evaluations in hiring, firing, promoting and adjusting the pay of Fire Fighters, Engineers and Fire Captains.

4. Battalion Chiefs have authority and discretion, subject to reasonable limitations and standards contained in KCFD manuals which are binding on all KCFD personnel, to assign personnel and equipment of their Battalions to particular locations and uses, and have further authority and discretion to direct, correct and

alter the methods of work employed, and authority to temporarily suspend subordinates from work subject to limitations contained in the Kern County Civil Service Rules.

5. Battalion Chiefs spend less than twenty percent (20%) of their time (excluding on-duty sleeping hours) performing tasks unrelated to, or only marginally related to their managerial and executive functions within their respective Battalions.

6. Battalion Chiefs are paid an amount expressed and computed as a bi-weekly salary. The salary is subject to deductions for unauthorized absences from work by reason of the California Constitution, Article XVI, Section 6 which proscribes a gift of public funds. The County of Kern has adopted implementing Ordinances and Civil Service Rules as required by the State Constitution which prevent making a gift of public funds.

7. As to possible deductions for unauthorized absences, Battalion Chiefs are treated no differently than any other Civil Service employee of the County of Kern, including Department heads and categorically FLSA exempt (29 CFR 541.302) employees such as doctors and lawyers.

8. The salary paid to Battalion Chiefs exceeds $250.00 per week and is paid for their management of customarily recognized subdivisions of the KCFD, to wit fire battalions.

CONCLUSIONS OF LAW

1. Battalion Chiefs within the KCFD are bona fide executive employees in accordance with the "Duties Test" contained in the Fair Labor Standards Act at 29 CFR sec. 541.1(a) through (e), inclusive.

2. Battalion Chiefs within the KCFD are paid a salary within the meaning of the "Salary Test" contained in the Fair Labor Standards Act at 29 CFR sec. 541.1(f).

Alternatively, the "Salary Test" is inapplicable to government employers who are statutorily precluded from paying other than for goods and services received, as expressed in the Department of Labor's Letter Ruling dated January 29, 1986.

3. Battalion Chiefs within the KCFD are exempt from the coverage of the Fair Labor Standards Act as being employed in a bona fide executive capacity, in accordance with section 213(a)(1) of the Fair Labor Standards Act, 29 USC sec. 201 et seq.

DATED: May 31st 1988

/s/ M. D. Crocker
Myron D. Crocker
U. S. District Court Judge

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COUNTY OF KERN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAN ABSHIRE, et al.,
Plaintiffs,
vs.
THE COUNTY OF KERN,
Defendants.

NO. CV-F 86-533 MDC
JUDGMENT

This matter came on regularly for trial commencing May 3, 1988, the Honorable Myron D. Crocker, United

States District Judge, presiding, and the issues having been duly tried and a decision rendered.

IT IS ORDERED AND ADJUDGED defendant, COUNTY OF KERN, have judgment in its favor, that Battalion Chiefs employed by the Kern County Fire Department are Bona Fide Executive Employees within the meaning of the Fair Labor Standards Act, and are therefore exempt from coverage of said Act, and that defendant, COUNTY OF KERN, recover its costs in this action from plaintiffs.

Dated at Fresno, California, this ___ day of July 1988.

Clerk of the U.S. District Court

IT IS SO ORDERED
DATED JUL 18 1988

/s/ M. D. Crocker
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WILLIAM HARTMAN, *et al.*,
Plaintiffs,
v.
ARLINGTON COUNTY, VIRGINIA,
Defendant.

No. 88-1418-A

ARLINGTON COUNTY'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff's response to the Motion for Summary Judgment demonstrates that plaintiffs cannot dispute the following material facts supporting the County's motion:

1) The salary range for Fire Shift Commanders in Arlington County is $37,691.68 to $53,162.72, well in excess of the $250.00 per week salary standard required by the Department of Labor's "short test" for exempt executive employees;

2) the Shift Commander's salary is the same for any 28-day work period whether the Fire Shift Commander works 216 hours or 240 hours;

3) the Fire Shift Commander regularly receives a predetermined salary, "constituting all or part of his compensation, which amount is not subject to reduction

because of variations in the quality or quantity of the work performed" within the meaning of 29 C.F.R. § 541.118(a);

4) the additional compensation Fire Shift Commanders receive for hours worked beyond their regular shift does not detract from the "salary basis" of their compensation since 29 C.F.R. § 541.118(a) and (b) provide that "the salary may consist of a predetermined amount *constituting all or part of the employee's compensation* [and] "*additional compensation besides the salary is not inconsistent* with the *salary basis of payment.*" 29 C.F.R. § 541.118(b);

5) the additional compensation Fire Shift Commanders receive for work beyond their regular shift is paid irrespective of the number of hours the Shift Commander actually works during the two-week period;

6) since April 15, 1986, no exempt employee in the Arlington County Fire Department has had any reduction in pay for absences of less than one full work day and that no plaintiff has had a reduction in pay for absences of less than one full work day;

7) written County policy regarding disability, sick leave, jury duty, and deductions from salaries of exempt County employees are consistent with a salary basis of compensation defined in 29 C.F.R. § 541.118;

8) the compensation of exempt employees of Arlington County is not subject to any reductions that would violate the salary

basis as defined in § 541.118 and the few inadvertent reductions inconsistent with § 541.118 that have occurred since April 15, 1986 were outside the Fire Department and have been remedied by the County;

9) the undisputed facts set forth in the Shift Commander's written responses to the County's Job Information Questionnaire, reveal that

   a) A Shift Commander's job is to "supervise an engine company" in order to deliver "efficient and effective fire and rescue services within my company's response area." Exhibit 5, page 2, A and B.

   b) A Shift Commander's "major duties" performed "on a regular basis", are

Daily Duties — Work Performed Every or Almost Every Workday	Approx. No. of Hours Performed per day
Supervise fire and rescue emergency incidents along with non-emergency incidents ie. lock outs, broken water pipes.	5 hrs.
Administrative duties including record keeping, filing, report writing, ordering supplies, contacting outside agencies etc.	2-3 hrs.

Provide training for my company on a daily basis and for other companies (medic, other jurisdictions, county agencies) weekly.	3 hrs.
Supervise daily shift meeting-assign tasks, update information.	1 hr.
Assist citizens entering the fire station for directions and giving BP checks, Charity food kits, public safety information.	1 hr.
Supervise physical training, ie. running, weight training and aerobics. Manage team building and related shift activities.	2 hrs.

Exhibit 5, page 2, 2A.

c) Fire Shift Commanders "supervise . . . 4 to 9 employees". Exhibit 5, page 9, 8B and Exhibit 6, page 9, 8B.

d) the undisputed facts set forth in Exhibits 5, 6, 7 and 8 contain repeated examples demonstrating that plaintiffs' primary duty is the management of their Fire Stations.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986), the United States Supreme Court stressed that not every dispute of fact requires a trial and resolved any ambiguities in Rule 56 in favor of more frequent use of summary judgment:

> [T]he mere existence of *some* alleged factual disputes between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* facts.

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . .
>
> [As to genuineness] there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

91 L.Ed.2d at 211, 212 (citations omitted).

The Court observed that ruling on a summary judgment motion necessarily involves application of the substantive evidentiary standards of proof that would apply at the trial on the merits. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 214. The Fourth Circuit has held that such evidence must rise to a level of probability, rather than a mere possibility. *Foster v. Tandy Corp.*, 828 F.2d 1052, 1056 (4th Cir. 1987); *Lovelace v. Sherwin Williams Co.*, 681 F.2d 230, 245 (4th Cir. 1982).

In *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-65 (4th Cir. 1985), the Fourth Circuit stated:

> [W]hen a motion for summary judgment is made and supported as provided in Rule 56, a non-moving party must produce "specific facts showing that there is a genuine issue for trial,"

> rather than resting upon the bald assertions of his pleadings. Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes.

Id. at 364-65.

In *Harkins v. City of Chesapeake*, No. 88-254-N (E.D. Va. Dec. 2, 1988) and *Chadwick v. City of Norfolk*, No. 88-254-N (E.D. Va. Dec. 19, 1988) (attached) the Court ruled that inadvertent deductions did not destroy the "salary basis" of compensation received by fire captains.

If a few inadvertent deductions in pay from non-Fire Department employees could destroy the executive exemption, then Arlington County would have no exempt employees at all, from the County Manager on down. This absurd result clearly conflicts with 29 C.F.R. § 541.118. The Department of Labor will not even enforce the Regulations at issue against public employees. See Wage & Hour Memoranda of January 9, 1987 and Opinion Letter of July 17, 1987.

Plaintiffs' conclusory assertions about their compensation and job duties do not dispute the hard facts in this record:

> To resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute. His bare contention that the issue is disputable will not suffice.

White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976), *quoting Zoby v. American Fidelity Company*, 242 F.2d

76, 80 (4th Cir. 1957). *See also Johnson v. McKee Baking Company,* 398 F. Supp. 201, 206 (W.D. Va. 1975) ("General allegations, therefore, will not prevent the award of summary judgment.")

In *First National Bank of Arizona v. Cities Service Company,* 391 U.S. 253 (1968), the United States Supreme Court of the United States discussed the requirements for avoiding the imposition of summary judgment under Rule 56(e):

> To the extent that ... Rule 56(e) should ... be read [to] ... permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files [a] ... complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 289-90. *See also United States v. Potamkin Cadillas Corp.,* 689 F.2d 379, 381 (2nd Cir. 1982) ("To defeat a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Such an issue is not created by a mere allegation in the pleadings nor by surmise or conjecture on the part of the litigants.").

Similarly in *Hahn v. Sargent,* 523 F.2d 461 (1st Cir. 1975), the First Circuit held that:

> To be considered "genuine" for Rule 56 purposes, a material issue must be established by "sufficient evidence supporting the claimed factual dispute" to require a judge or a jury to resolve the parties' differing versions of the truth at trial. The evidence manifesting the dispute must be "substantial," going beyond the allegations of the complaint.

Id. at 464 (citations omitted).

In *Harkins v. City of Chesapeake, supra* and *Chadwick v. City of Norfolk, supra,* Judge Clarke carefully set forth the legal principles against which plaintiffs' job duties must be measured. When those principles are applied to the undisputed material facts of this case, it is clear that Arlington County is entitled to summary judgment.

Respectfully submitted,

ARLINGTON COUNTY, VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Arlington County's Reply Memorandum in Support of Motion For Summary Judgment has been mailed, postage prepaid, to Thomas A. Woodley, Esquire and Gregory K. McGillivary, Esquire, MULHOLLAND & HICKEY, 1125 15th Street, N.W., Suite 400, Washington, D.C. 20005; Quentin R. Corrie, Esquire and Walter S. Boone, III, Esquire, ANDERSON, QUINN & WYLAND, 8111 Gatehouse Road, Suite 409, Falls Church, Virginia 22047, counsel for plaintiffs, this 12th day of April, 1989.

/s/ James P. McElligott

No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

v.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE MCKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER and STEVE MCLEMORE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should limit or reverse its ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), when the effect of such action would obstruct the ability of Congress to maintain a prosperous national economy and disrupt what is now uniform application of the law.

2. Whether Congress intended that the statutory exemptions of certain categories of employees from the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) are to be applied more expansively to state and local government employees than to Federal and private sector employees.

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INTRODUCTION

Petitioner County of Kern requests in this proceeding that the Court limit or entirely foreclose the ability of the United States Congress to regulate the wages and hours of state and local governmental employees. Another California county also seeks such relief from the Court in *County of Los Angeles v. Daniel E. Bratt, et al.*, No.

90-927, 912 F.2d 1066 (9th Cir. 1990). These agencies argue that the Court should reconsider and reverse the decision it rendered a mere five years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). They state that the "intrusive national regulation" of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) "abrogates state and local government ability to determine and implement the means of delivering traditional government services to meet local needs" (Petition of Los Angeles County at p. 7) and that "public employers are being unjustifiably forced to abandon traditional civil service rules, structure, checks and balances." (Petition of Kern County at p. 16.) In effect, these agencies contend that under the United States Constitution, the ability of Congress to maintain a prosperous national economy is subordinate to the ability of state and local governments to independently establish the wages and hours of their employees.

The Congress is faced today with a severe crisis in the banking and savings and loan industries. It must also cope with a national economy that is in a rapidly worsening recession. The Fair Labor Standards Act is one of the essential tools used by Congress to maintain an adequate standard of living for all Americans and promote full employment.[1] The state and local governmental workforce is so large now that Congressional regulation of the wages and hours of these employees is equally as critical to the maintenance of a prosperous national economy as Congressional regulation of the wages and hours of Federal and private sector employees.[2] If Congress is deprived of the necessary tools

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[1] *See* Ronald G. Ehrenberg & Paul L. Schumann, *Longer Hours or More Jobs?* (1982) for an overview of the debate on the wisdom of increasing the overtime premium as a way of stimulating employment growth and reducing unemployment and a summary of the relevant empirical evidence on the issue.

[2] The Bureau of the Census reports that in 1988 the total workforce in the United States was 118,104,000 persons, and that 14,402,000 persons, which is more than ten percent of the total

to effectively address the economic problems with which our nation is currently faced, state and local governments are likely to suffer tax revenue losses, escalating unemployment insurance and welfare benefit claims, and other economic harm far beyond the costs imposed upon them through application of the Fair Labor Standards Act.

This Court correctly recognized in *Garcia* that Federal regulation of the wages and hours of the employees of state and local governments is fully consistent with previously accepted constitutional principles of federalism. After *Garcia*, Congress amended the Act at the instigation of state and local governments to alleviate any unexpected hardship that might be caused by its immediate application to those agencies. Nothing prevents state and local governments from petitioning Congress to further amend the Act if its provisions continue to be inappropriately burdensome for them. Congress is better able than this Court to weigh the costs which the Act imposes upon state and local governments against the benefits thereby provided to the national economy, and is therefore better able to decide whether it would be in the national interest to limit or eliminate application of the Act to those agencies. For all of these reasons as well as those expressed below, the Court should reject the invitations for it to revisit its holding in *Garcia* and should deny the petitions of Kern County and Los Angeles County for writs of certiorari.

STATEMENT OF THE CASE

Background

The Fair Labor Standards Act of 1938, as amended, provides certain minimum wage and overtime protections to workers who are covered by the Act. Section 6(a) (29 U.S.C. § 206(a)) requires that employers must pay their workers at least the prescribed minimum hourly

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workforce, were employed by state and local government. United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 1990 (110th Ed.), p. 395.

wage ($4.25 an hour after March 31, 1991). Section 7(a) (29 U.S.C. § 207(a)) provides in part that employers must pay their employees at one and one-half times their regular rate of pay for hours worked in excess of forty (40) per workweek. The purpose of this "overtime" pay requirement was to fairly and fully compenate employees who are forced to work long hours while providing economic incentives to employers to reduce the hours of work and to hire additional persons.

In 1974, Congress passed certain amendments to the Act which extended its coverage to state and municipal employers as of January 1, 1975. However, due to the unusual working conditions and long tours of duty of fire fighters and some law enforcement employees and in order to alleviate the financial burdens that might otherwise be imposed on public employers, Congress added section 7(k) (29 U.S.C. § 207(k)) as a special overtime provision for employees in those categories. Instead of requiring overtime compensation after forty (40) hours of work in seven (7) days, this section established a higher threshold that would, over several years, be reduced to 216 hours in a 28-day work period (or, proportionately, 54 hours in seven (7) days). Alternatively, if studies conducted by the United States Department of Labor showed that the hourly overtime threshold for these employees should be lower than 216 hours, then such lower hourly threshold would apply.

Many state and municipal employers proceeded to negotiate agreements with their employees for implementation of the Act. However, one day before the date upon which the 1974 amendments were to become effective, Chief Justice Burger issued an order staying their enforcement. *National League of Cities v. Brennan*, 419 U.S. 1321 (1974). Subsequently, this Court held in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that it was beyond the authority of Congress to impose the Act's minimum wage and overtime regulations on

state and local government employees because this would "directly displace the States' freedom to structure integral operations in areas of traditional government functions. . . ." 426 U.S. at 852. Throughout the decision, the Court expressed its concern that if the states did not retain control over their employees' hours of work and levels of compensation, the states would be forced to raise taxes or cut services to meet any increased costs. Consequently, the Court found that state sovereignty and the Tenth Amendment set limitations on the commerce power and that Congress cannot "wield its power in a fashion that would impair the States' 'ability to function in a federal system'." *Id.*

It is clear that *Usery* was an aberration at the time it was issued, and was eroded so rapidly and steadily that it never became accepted constitutional doctrine.

Usery expressly overruled *Maryland v. Wirtz*, 329 U.S. 183 (1968), which had upheld the application of the Act to certain state employees. In debating and passing the 1974 amendments, members of Congress generally considered the constitutionality of the proposed extension to state and municipal employees as an issue that had been settled by *Wirtz*. As Rep. Jordan commented,

> Some people are concerned about the separation of powers and possible infringements on the privileges of other levels of government. The U.S. Supreme Court does not see things that way, because they have already upheld the authority of Congress to cover state and local employees. This opinion was delivered in *Maryland v. Wirtz*, 392 U.S. 183 (1968), a case which the 1966 coverage of employees of state and local hospitals and schools was upheld.

Remarks of Rep. Jordan, 93d Cong., 2d Sess. 24 (1974), reprinted in 1 *Legislative History of the Fair Labor Standards Amendments of 1974 (Pub.L. No. 93-259)* (1976) at 263. *See also*, S. Rep. No. 93-690, *Id.*, at 1528.

Usery was thus clearly a true break with past constitutional precedent. That it might not endure for long was suggested by the opinion itself. Justice Rehnquist's decision was joined by only three other justices. In a concurring opinion, Justice Blackmun agreed that the 1974 amendments were unconstitutional but stated that he was uneasy about the decision. "Although I am not untroubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother Brennan." *Usery, supra*, 426 U.S. at 856.

Justice Brennan, with whom Justices White and Marshall joined, bitterly denounced the majority for abandoning precedent:

> The reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," . . . not only suggests that they overrule governing decisions of this Court that address this question but must astound scholars of the constitution.

Id., at 861-62.

Justice Brennan pointed out that since the time of Chief Justice John Marshall, the political process, not the Constitution, has been the source of restraint upon Congressional exercise of its commerce power. *Id.*, at 857. He charged that:

> Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree.

Id., at 867.

Justice Stevens dissented in a milder tone, stating that although he, too, disagreed with the wisdom of the 1974 amendments, the principle upon which the *Usery* holding rested was difficult to perceive. He wrote:

> The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.
>
> The Federal government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation.

Id., at 880-81.

As soon as the *Usery* decision was published, legal commentators began to predict its demise. One noted that:

> If anything seemed settled in contemporary American Constitutional law, it was the meaning of the Tenth Amendment. Chief Justice John Marshall stated, almost in the beginning, that the Amendment expressed no limitation on the powers of the national government.

Barber, S., *National League of Cities v. Usery: New Meaning For The Tenth Amendment*, 1976 Supreme Court Review 161. Writing when *Usery* was still new, Barber predicted that the doctrine of *Usery* would not survive, although some of the state's rights values that it embodied might legitimately be fostered in other ways. Barber stated:

> *League of Cities* would thus transport us from a regime which has sacrificed states' sovereignty for congressional supremacy to a regime in which the Court will balance states' rights against interests

> represented by Congress. One cannot read the several opinions of the case and be confident about its future. Without a doubt the decision will be roundly condemned by constitutional scholars. Solid constitutional ground for the holding will be difficult to discover. The decision departs from the expressed terms of the Constitution even as Mr. Justice Rehnquist himself previously understood those terms. It virtually ignores contrary opinions by Chief Justice Marshall, enjoying in most quarters the status of founding documents. The decision seems in conflict with Mr. Justice Rehnquist's expressed views that judicial policy making is contrary to the language and intent of the framers.

Id., at 164 (footnote omitted).

Seven years after *Usery*, the commentator Bernard Schwartz concluded that *Usery* had failed to turn back the constitutional clock to the days of dual federalism under which earlier Federal and state governments were to regard each other as equals. Schwartz, B., *National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out To Be Only A Judicial Molehill?*, 52 Fordham L. Rev. 329 (1983). Schwartz joined in the prediction of other constitutional scholars that "[r]ather than restoring the traditional concept of dual federalism, *National League of Cities* may prove only an abberation." *Id.*, at 330.

Usery resulted in a confusing array of judicial decisions as to which state and local government functions were traditional and which were not. In many instances, this Court applied *Usery* so narrowly that it can be said not to have followed it at all. For example, the Court held after *Usery* that states may be liable for back pay as employers under Title VII of the Civil Rights Act of 1964 (*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)), that cities may be liable in some circumstances for violation of the Federal antitrust laws (*Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982)), that states

must meet mandatory minimum Federal standards for surface mining operations (*Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981)), that states must consider the Federal standards for regulation of electric and gas utilities (*FERC v. Mississippi*, 456 U.S. 742 (1982)), that Federal labor law can be applied to the state-owned Long Island Railroad (*United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982), and that the Age Discrimination in Employment Act applies to state and local governments (*EEOC v. Wyoming*, 460 U.S. 226 (1983)).

As one writer noted, commitment to principled decision-making required either that the Court apply *Usery* to all cases coming before it, or that the Court overrule it. *See* Fiax, K., *In the Wake of National League of Cities v. Usery: A "Derelict" Makes Waves*, 34 S.C.L. Rev. 647, 684 (1983).

The Court ultimately agreed and, in 1985, expressly overuled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528. The decisive vote of Justice Blackmun, who reversed the position he had taken in *Usery*, resulted in the virtual reinstatement of *Maryland v. Wirtz*, *supra*, 392 U.S. 183. The Court found that the "traditional governmental function" test of *Usery* was both unworkable and inconsistent with the federalist principles embodied in the Constitution. Noting that the states had successfully exerted their influence in the political process to exempt themselves in whole or part from a wide variety of obligations imposed by Congress under the Commerce Clause, including the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act, the Court concluded that state and local governments must also rely upon the political process rather than the processes of this Court to limit or eliminate the application to them

of the minimum wage and overtime provisions of the Fair Labor Standards Act. *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at 553-555.

State and local governments received the message of this Court and turned to Congress for relief. As the result, the application of *Garcia* was delayed by passage of the Fair Labor Standards Act Amendments of 1985 (Pub.L. 99-150). In response to complaints from state and local governments that they were not prepared for the financial burdens imposed upon them by the Act, Section 2(c) of those Amendments provided that state and local governments would not be liable for overtime violations of the Act until April 15, 1986, and would not be required to make actual payment of overtime compensation until August 1, 1986. This had the effect of retroactively wiping out the liability for overtime pay that state and local governments would otherwise have accrued from the date of *Garcia* through April 14, 1986.

Congress also took action to preserve the common practice of state and local governments to provide compensatory time off in lieu of overtime pay. Section 2(b) of Pub.L. 99-150 provided that: "A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)) [subsection (o) of this section]." Through the addition of section 7(o) (29 U.S.C. § 207(o)) to the Act, Congress allowed state and local governments, but not private employers, to reduce the costs of overtime work by substituting compensatory time off for overtime pay, provided that an employee's accumulation of compensatory time does not exceed 240 hours or, in the case of public safety employees, 480 hours.

The Facts of This Case

Employees in the ranks of Captain and Battalion Chief in the Kern County Fire Department brought this action on October 27, 1986, after the county declared that they were "bona fide executive employees" exempt from the overtime provisions of the Fair Labor Standards Act pursuant to 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.1. The Kern County Fire Department employs 28 persons in the rank of Battalion Chief, 171 persons in the rank of Captain, 193 persons in the rank of Engineer, 111 persons in the rank of Firefighter, and 6 persons in the rank of Heavy Equipment Operator. After *Garcia*, the county began providing overtime compensation to employees in the ranks of Engineer, Firefighter, and Heavy Equipment Operator in compliace with the Act. Prior to trial, the county conceded that employees in the rank of Captain are also covered by the Act. Accordingly, the only issue addressed at trial was whether the terms and conditions of employment of Battalion Chiefs meet the criteria for the "bona fide executive employee" exemption.

The administrative regulations promulgated pursuant to the Act establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. § 541.1 (a-f). The exemption does not apply unless an employee meets both tests. *Hodgson v. Barge, Waggoner And Sumner, Inc.*, 377 F.Supp. 842, 844 (M.D. Tenn. 1972), *aff'd without opinion*, 477 F.2d 598 (6th Cir. 1973).

With regard to the requirement that an employee must be paid on a "salary basis" in order to qualify as a "bona fide executive employee" exempt from the minimum wage and hour protections of the Act, a critical requirement is that the employee's pay not be subject to a deduction for absences shorter than a full day. Although 29 C.F.R. §§ 541.118(a)(2) and (3) provide that deductions made from an employee's pay for absences from work for a day

or more for personal reasons or, in the event the employer has a plan of providing compensation for loss of salary for sickness or disability, for sickness or disability, do not affect the salaried status of the employee, deductions for absences shorter than a full day fall under neither exception. "A salaried professional employee may not be docked pay for fractions of a day of work missed." *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983). This is because payment by the hour worked is completely antithetical to the concept of an executive as an employee whose responsibilities are not measured in hours but rather in his performance of a particular task. Consequently, an employee compensated for his services on an hourly basis, rather than a salary basis, is not a "bona fide executive," even though he may have supervisorial duties and responsibilities and possess greater authority than his subordinate employees. *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 466 (9th Cir. 1973); *Craig v. Far West Engineering Co.*, 265 F.2d 251, 257-260 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959); *Donovan v. Kentwood Development Co., Inc.*, 549 F.Supp. 480, 484 (D.Md. 1982); *Ulright v. Zenner & Ritter, Inc.*, 27 W&H Cases 1135, 1137-38 (W.D.N.Y. 1986); *Donovan v. Rockwell Tire & Fuel*, 26 W&H Cases 726, 733 (M.D.N.C. 1982).

The fact that the employer refers to the pay of an employee as a "salary" is not determinative of whether that employee is paid on a "salary basis" within the meaning of 29 C.F.R. § 541.118. The label that an employer gives to the compensation provided to an employee has little legal significance with regard to the issue of whether the requirements of the regulations have been met. *Retail Store Employees Union, Local 400 v. Drug Fair-Community Drug Co.*, 307 F.Supp. 473, 478 (D.D.C. 1969).

With regard to the "duties test," the regulations explain that an executive is something more than merely

a supervisor of other employees. "In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit that has a continuing function." 29 C.F.R. § 541.1(a).

The evidence at trial established that Battalion Chiefs in the Kern County Fire Department are covered by a collective bargaining agreement which provides that they are to receive overtime pay after the number of hours they work exceeds the equivalent of 56 hours per week on an average. These employees are also paid at straight time rather than time and one-half when they attend training classes which are held during hours outside of their regularly scheduled hours of work. Under the Act, fire protection employees are entitled to receive pay at the rate of time and one-half for all hours worked in excess of 53 hours per week on an average. Hence, a judgment that Battalion Chiefs are covered by the Act would result in payment to them at the rate of time and one-half rather than straight time for attendance at training activities and at the rate of time and one-half rather than straight time for three (3) hours of their 56 regularly scheduled hours of work each week.

The evidence also established that the county disregarded its own ordinances and administrative regulations when it declared that Battalion Chiefs are "bona fide executive employees." The county's employee relations ordinance prohibits the inclusion of management employees in a single employee representation unit with nonmanagement employees. However, employees in the rank of Battalion Chief were placed by the county in the same representation unit and are covered by the same collective bargaining agreement as the employees in all of the lower ranks of the fire department. The only ranks excluded from that representation unit are those of

Fir hief and Deputy Chief. Thus, the county's application of its own ordinances demonstrated that it had never deemed Battalion Chiefs to be management employees until it became obligated to provide compensation to its employees in accordance with the requirements of the Fair Labor Standards Act.

The county also treats its Battalion Chiefs in a manner clearly inconsistent with its declaration that these employees are "bona fide executives." Battalion Chiefs assigned to fire suppression duties are "56-hour fire duty" employees whose work shifts commence at 8:00 a.m. and conclude at 8:00 a.m. two days later for a scheduled duration of 48 hours. They must wear uniforms and remain within their battalion areas whenever they are on duty, including Sundays and holidays. They may not attend church while they are on duty and must obtain permission from a superior officer before taking time off from duty for personal business. They may not go to a barber shop for a haircut or engage in other activities while on duty that the public might think unsuitable for a uniformed employee during work hours. Any time taken off from work by Battalion Chiefs and other "fire duty" employees without prior authorization by a superior officer is time without pay. The Fire Chief and his Deputy Chiefs, on the other hand, are provided by the county with the benefits and perquisites usually reserved for executives. Deputy Chiefs do not wear uniforms. A Deputy Chief in charge of one of the fire department's three shifts is scheduled to work 10-hour days on those days when that shift is on duty and is also scheduled to be on duty every Tuesd y and Wednesday. However, these Deputy Chiefs may take time off from their scheduled hours of work without deduction from their pay to play golf, and are not required to go into the office but instead are free to stay home and watch football games or engage in family activities when they are scheduled to work on a holiday, so long as they are

available by pager or telephone. They are also free to attend church on the Sundays when they are in charge of the department's operations. As long as the time which they take off from work for personal affairs is of a short duration and they appoint someone else to be in charge while they are gone, they receive their regular pay for that time without being required to report that time as paid leave. It is not considered inappropriate conduct for Deputy Chiefs to go to a barber shop to get their hair cut during their work hours.

It was also made clear by the evidence that Battalion Chiefs in the Kern County Fire Department implement policy rather than make policy. The battalions within the Kern County Fire Department do not have separate, autonomous budgets within which Battalion Chiefs have authority or discretion to establish their own priorities for purchases of supplies and equipment or for expenditures on personnel. Instead, all such priorities are established by the Fire Chief and the Deputy Chiefs. The Fire Chief and Deputy Chiefs make all decisions regarding the tools and supplies that are purchased for and kept in the fire stations and on the fire engines in each battalion for use in responding to emergencies, the training methods and practices that are to be followed in each battalion, the selection of employees who are to be assigned to each battalion, and the techniques that are to be used by the employees in each battalion in the performance of their work. Battalion Chiefs do not have the authority to grant or approve overtime work except in certain emergency situations. Battalion Chiefs do not have the authority to decide which fire stations within their battalion areas are to be operational and which are not. Battalion Chiefs have no authority to determine the number of fire engines that are to be assigned to each fire station in their battalions, or which engines are to be assigned to which stations, or even the amount and types of fire hose that is to be carried on each fire engine.

A Battalion Chief does not have the authority to equip the fire engines in his battalion with the amounts and types of hose that he believes would be most effective in protecting the buildings in his battalion area, or to call in volunteer fire fighters or move fire companies from other battalion areas into his battalion area to provide interim fire protection while the regular fire companies in his battalion are engaged in responses to emergencies, or to withhold fire companies in his battalion from responses to fire calls from locations in other battalion areas, except with approval from a Deputy Chief.

Notwithstanding this evidence, the district court concluded that the terms and conditions of employment of Battalion Chiefs in the Kern County Fire Department met both the "duties test" and the "salary basis test" for exemption from the Fair Labor Standards Act as "bona fide executive employees," and entered judgment in favor of the county. That judgment was reversed by the Ninth Circuit Court of Appeals, which held that Battalion Chiefs are not "salaried" within the meaning of the regulations defining the "salary basis test." Because this finding was all that was necessary for reversal, the Ninth Circuit did not decide whether the district court also erred in its conclusion that the terms and conditions of employment of Battalion Chiefs are sufficient to meet the "duties test." [3]

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[3] The county's request that this case be remanded to the Ninth Circuit with instructions to reinstate the judgment of the district court would thus not be appropriate even in the event this Court were to rule that the Ninth Circuit erred in its holding that the terms and conditions of employment of Battalion Chiefs do not meet the "salary basis test." Instead, the matter would have to be remanded to the Ninth Circuit with directions that it determine whether the district court erred in its conclusion that the terms and conditions of Battalion Chiefs are also sufficient to meet the "duties test."

ARGUMENT

I. THE COURT SHOULD DECLINE THE COUNTY'S INVITATION TO OVERTHROW SETTLED PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION THAT ARE NOW INCORPORATED INTO PUBLIC EMPLOYER-EMPLOYEE RELATIONSHIPS THROUGHOUT THE NATION.

During the five year period since the decision of this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528, state and local governments throughout the nation have incorporated the minimum wage and hour protections of the Fair Labor Standards Act into their statutes, ordinances, and collective bargaining agreements. Time and one-half for overtime has finally become a reality for employees who, for too many years, had been relegated to the status of second class citizens. Skilled and capable workers need no longer leave public employment for the private sector in order to obtain full and fair compensation for their labor.

The counties of Kern and Los Angeles nevertheless ask this Court to turn back the clock and return to the confusing precepts of *National League of Cities v. Usery* and its muddled progeny. Even though they are unable to show that there has been any real difference during the past five years in their ability to determine and implement the means of delivering traditional government services to meet local needs, or that state and local governments have been unable to meet the financial burdens imposed upon them by the Act, these counties nevertheless argue that these abstract considerations justify a decision by this Court to revisit *Garcia* and reinstate *Usery*.

Practical considerations compel the opposite conclusion. When this Court issued its decision in *Usery*, the Act had yet to be implemented by state and local governments. Today, however, the Act is accepted as

the law of the land for all public and private sector employees. Accordingly, a decision by this Court to revisit *Garcia* would cause a massive disruption in settled employment relationships. State and local governments, having already implemented the minimum wage and overtime protections of the Act for the great majority of employees in their workforces, would face extreme resistance from those employees against any attempt to rescind the statutes, ordinances and collective bargaining agreements in which those protections are currently incorporated. It would be no less difficult to make an omelette back into an egg. Widespread labor unrest and interruptions of essential public services is the obviously foreseeable result.

In order to fashion an argument to suit its purposes, Kern County has greatly exaggerated the effect of the decision of the Ninth Circuit in this action. A clear example of such exaggeration is the county's contention at page 3 of its petition that its "fiscal exposure to date for potential back overtime pay to the 28 Battalion Chiefs is in the hundreds of thousands of dollars." These employees were already entitled under their collective bargaining agreement with the county to be paid at the rate of time and one-half for all hours which they work in excess of 56 hours per week on an average. The effect of the decision of the Ninth Circuit is that these employees will be paid at the rate of time and one-half rather than straight time for the hours which they work in excess of 53 hours per week on an average rather than 56 hours per week on an average. This is an increase of one and one-half hours of pay per week from the amount they now receive. As noted by the county at page 4 of its petition, their annual salaries range from $40,536.00 to $49,476.00. The maximum pay for Battalion Chiefs is thus $951.47 per week. Since they work an average of 56 hours per week, their maximum hourly wage rate is $17.08. One and one-half hours of pay at this hourly

rate is $25.62. Fifty-two weeks of additional pay in this amount totals $1332.24 per year. Thus, if all 28 Battalion Chiefs received this amount of additional pay each year, the total annual cost to the county would not be hundreds of thousands of dollars, as claimed by the county, but rather 28 times $1332.24, or $37,302.74. This relatively inconsequential sum is far less than the overtime liability which the county acknowledged to the 171 Captains in the Kern County Fire Department after the commencement of this litigation. The county has made no showing that it had any difficulty in finding the means to meet that liability, nor that it had any difficulty in finding the means after *Garcia* to provide overtime compensation to 193 Engineers, 111 Firefighters, and 6 Heavy Equipment Operators as required by the Act. It is reasonable to assume that the county would have far less difficulty in finding the means to meet its overtime liability to 28 Battalion Chiefs than in finding the means to meet its overtime liability to those 481 subordinate personnel. Hence, the county's claim that it faces the prospect of bankruptcy as the result of the Ninth Circuit's decision in this action is plainly specious.

The import of this Court's decision in *Garcia* is that Congress is better able than this Court to weigh the costs of minimum wage and hour legislation to state and local governments against the benefits of such legislation to the national economy. The county fails to show that it availed itself of the special exceptions for state and local governments which Congress included in the 1985 Amendments to the Act after this Court's decision in *Garcia*, such as the provision that allows state and local governments to substitute compensatory time off in place of pay for overtime work, and yet was still unable to deliver traditional government services so as to meet local needs. It is therefore unable to demonstrate the actual existence of any compelling need that would justify interference by the Court with the balance that Congress struck in

the 1985 amendments between the competing interests of state and local governments and the national economy.

Furthermore, this Court made clear in *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*, 452 U.S. 264, that when a violation of the Tenth Amendment is alleged, the determining issue is not the potentially harmful effect of Federal legislation on state and local governmental finances but rather the nature of the Federal action. The Court stated:

> Moreover, even if it is true that the Act's requirements will have a measurable impact on [the State's] economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.

Id., at 292 n.33.

For all of these reasons the Court should decline Kern County's invitation to revisit the holding of *Garcia* that Congress acted within the authority granted to it by the Commerce Clause when it imposed the minimum wage and overtime provisions of the Fair Labor Standards Act upon state and local governmental employees.

II. NO JUDICIAL OR LEGISLATIVE AUTHORITY SUPPORTS THE COUNTY'S CONTENTION THAT THE "BONA FIDE EXECUTIVE EMPLOYEE" EXEMPTION OF THE FAIR LABOR STANDARDS ACT IS TO BE APPLIED MORE EXPANSIVELY TO STATE AND LOCAL GOVERNMENT EMPLOYEES THAN TO FEDERAL AND PRIVATE SECTOR EMPLOYEES.

The Court should also decline the county's invitation to address and decide the issue of whether the "bona fide executive employee" exemption of the Fair Labor Standards Act is to be applied more expansively to state and local government employees than to Federal and private sector employees. In the first place, the county did not present any argument to the district court or to the

Ninth Circuit Court of Appeals that Congress intended such a result. As a general rule, absent exceptional circumstances, this Court will only consider and decide issues that have first been presented to the lower courts for decision. *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Patrick v. Burget*, 486 U.S. 94 (1988). Moreover, the county is unable to cite any judicial or legislative authority whatever in support of this proposition. Its arguments on this point are manifestly without merit and thus clearly not deserving of a full hearing by the Court.

The committee reports and the official House of Representatives report leading to the 1974 Amendments make clear that when Congress extended the Fair Labor Standards Act to state and local government employees in 1974, it was the intent of Congress that the same minimum wage and hour standards are to be applied to government that government applies to private sector employers. The 1973 Senate report leading up to the 1974 amendments states:

> The Committee recognizes and the bill reflects an awareness that to raise the minimum wage without expanding the coverage of the Act would serve to deny even the minimum benefits of the Act to large groups of workers who have been denied the protection of the Act for more than 30 years. . . . Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize—his employer, whether that employer is engaged in private business or in government business.

S. Rep. No. 300, 93d Cong., 1st Sess., at 17, 25.

The 1985 Amendments, adopted after *Garcia*, were not intended to signal a retreat from that position. In adopting those amendments, Congress expressly reaffirmed its previous commitment that state and local governmental employees are to be provided with all of the protec-

tions which the Act accorded to employees of the Federal government and the private sector:

> In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of your most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers have now been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. *The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.*

S. Rep. No. 159, 99th Cong., 1st Sess., at 7 (emphasis added.)

To the extent that state and local governmental employers have special circumstances which require different treatment of overtime work under the Act, Congress addressed those special circumstances in 1974 through the adoption of section 7(k) (29 U.S.C. § 207(k)), which establishes that fire protection personnel need not be paid at the rate of time and one-half until they work 53 hours per week on an average, and in 1985 through the adoption of section 7(o) (29 U.S.C. § 207(o)), which permits state and local governmental employers but not private sector employers to provide compensatory time off in lieu of overtime pay. As Kern County notes at page 6 of its petition, a number of bills were introduced in Congress after *Garcia* that would have substantially restricted or entirely eliminated the application of the Act to state and local governmental employers. However, the compromise bill ultimately adopted by Congress made no change to

section 13 of the Act (29 U.S.C. § 213), which defines the categories of employees exempt from the Act. If Congress had intended to create distinctions in the scope of the Act's coverage as between state and local government employees and Federal and private sector employees, it would have expressly done so by amending section 13 just as it expressly permitted state and local governmental employers to provide compensatory time off in lieu of overtime pay by its amendment of section 7. The fact that the 1985 Amendments made no change to section 13 thus indicates the intention on the part of Congress that the categories of employees defined in section 13 as exempt from the Act are to be applied to state and local governmental employees in the same manner as they have been and currently are applied to Federal and private sector employees.

The county contends at pages 6-7 of its petition that the 1985 Amendments should instead be given a meaning consistent with the bills that were introduced after *Garcia* which would either have entirely exempted state and local governments from application of the Act or would have exempted those agencies from the Act's overtime provisions. However, as the county concedes, these bills were not adopted. This Court declared in *Bob Jones University v. United States*, 461 U.S. 574 (1983) that the failure of Congress to amend legislation is ordinarily of no value in the interpretation of that legislation:

> Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. See, *e.g.*, *Aaron v. SEC*, 446 U.S. 680, 694, n.11 (1980). We have observed that "unsuccessful attempts at legislation are not the best of guides to legislative intent," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969).

Id., at 600.

Accordingly, the county is unable to make any plausible argument in support of its contention that Congress in-

tended for the "bona fide executive employee" exemption of the Fair Labor Standards Act to be applied more expansively to state and local government employees than to Federal and private sector employees.

Equally without support is the county's contention that the Act should only be applied to state and local governmental employees whose jobs are "nonsupervisory." The county again seeks to revisit an issue that is now well settled. In 1949, following hearings on the issue of whether the definition of a "bona fide executive employee" should be revised, the Administrator of the Wage and Hour Division of the Department of Labor adopted a recommendation of the Presiding Officer that this exemption not be equated with the definition of the term "supervisor" in the 1947 Taft-Hartley Act. The Presiding Officer explained that the language of the two statutes evidenced a clear difference in legislative intent:

> There are also other indications that the provisions of the two statutes were formulated with different objectives in mind. That the Administrator's regulations were known to the Congress is evident from the fact that the Taft-Hartley definition of "professional employee" parallels very closely, in part, the Administrator's definition of "bona fide professional." It is reasonable to assume that the Congress also knew that these regulations deal with "bona fide executive" employees. Nevertheless, the Congress chose to exclude from the definition of employee in the Taft-Hartley Act "supervisors" rather than "bona fide executives," which seems to me an obvious expression of a difference in intent.

United States Department of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations On Proposed Revisions Of Regulations, Part 541, Defining The Terms "Executive", "Administrative", "Professional", "Local Retailing Capacity", And "Outside Salesman"*, June 1949, pp. 4-5.

The Presiding Officer based his recommendation in part on the fact that employees who hold management and supervisory positions have no collective bargaining rights and therefore often have an even greater need than rank and file employees for the minimum wage and hour protections of the Act:

> In enacting the Taft-Hartley Act, the Congress evidently sought to give effect to its judgment that supervisors should not be protected by the National Labor Relations machinery if they organize and bargain collectively. If the further step were to be taken of adopting the definition of "supervisor" for the Administrator's regulations, these very employees would, in addition, be denied the protection of the Fair Labor Standards Act. It appears to me, by contrast, that the enactment of the Taft-Hartley Act with its definition of "supervisor" has made increasingly important the need to distinguish carefully between those whom the Congress intended to exempt as "bona fide executives" because they do not need the protection of the Fair Labor Standards Act, and those who, though they may perform some supervisory duties need the protection of the Fair Labor Standards Act because they do not have the privileges and benefits which normally accrue to bona fide executives.

Id., at p. 5.

There is no reason to assume that Congress was any less aware of the well settled meaning of the "bona fide executive employee" exemption when it passed the 1985 Amendments to the Fair Labor Standards Act. Because those amendments made no change to section 13(a) of the Act (29 U.S.C. § 213(a)), which provides for that exemption, the manifest intent of Congress was that this exemption is to be applied to state and local governmental employees in management and supervisory positions in the same manner that it has been applied in the private sector.

The "nonenforcement policy" adopted by the Department of Labor in a Letter Ruling dated January 9, 1987, is also of no assistance to the county. That policy, which is set forth in its entirety in the Appendix to this brief, was intended only to address those special circumstances in which a state or local governmental employer is required by legal constraints to make deductions from the pay of its employees for time not worked. By its own terms, it did not expand the "bona fide executive employee" exemption nor eliminate the "salary basis" test for that exemption. Instead, it decreed only that the Department of Labor

> . . . will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).
>
> This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable state or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

Where, as here, there are many other indicia that Battalion Chiefs are not paid on a "salary basis" in addition to the country's policy of making deductions from their wages for absences of less than a full day, this nonenforcement policy is simply irrelevant.

Moreover, this policy explicitly states that it is not intended to affect any employee's rights under section 16(b) of the Act (29 U.S.C. § 216(b)), and thus is not applicable in a suit brought by a private citizen.

In any event, the county did not introduce any local ordinance or regulation into evidence at trial, and has not cited any such local ordinance or regulation in its petition, that would actually prevent it from making payments to an employee for absences of less than a day for personal reasons, or because of illness or accident, which are not covered by available paid leave. Although it is undisputed that the county's policy is to make such deductions from the pay of Battalion Chiefs, the evidence demonstrated that the county applies a different policy to its Fire Chief and Deputy Chiefs and does not hold those employees accountable for their work on an hourly basis. The fact that the county is thus able to compensate its Fire Chief and Deputy Chiefs on a "salary basis" demonstrates the mendacity of its contention that it must employ Battalion Chiefs on an hourly basis to avoid a violation of the prohibition against gifts of public funds which, according to the county, appears in Article XVI, section 16 of the California Constitution.

That prohibition is actually set forth in Article XVI, section 6 of the California Constitution. It has never been interpreted by any court or administrative agency as requiring that all state and local government employees must be employed by the hour rather than on a "salary basis." The Ninth Circuit correctly concluded that "so odd a policy" would not be a reasonable construction of Article XVI, section 6.

The decision of the Fourth Circuit in *Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990) does not interpret the United States Constitution, the Fair Labor Standards Act, or the regulations of the Department of Labor inconsistently with the decision of the Ninth Circuit in this action. *Hartman* involved Fire Shift Commanders employed by the Arlington County, Virginia Fire Department. The district court found that no deductions had been made from the pay of these employees except those permitted

under 29 C.F.R. § 541.118(a), and that the county had adopted a policy that their wages would not be subject to deduction for absences of less than one full work day. *Hartman v. Arlington County*, 720 F.Supp. 1227 (E.D. Va. 1989). Thus, on the one hand, a Battalion Chief in the Kern County Fire Department is required to be on duty all day, in uniform, on Christmas Day, even if there is no actual work for him to do that day, otherwise a deduction will be made from his pay. On the other hand, a Fire Watch Commander in the Arlington County Fire Department is apparently free to absent himself from duty and spend part of the day at home with his family on Christmas and holidays and still receive his full salary. A Fire Watch Commander in the Arlington County Fire Department is thus employed on terms more akin to the terms of employment of Deputy Chiefs than Battalion Chiefs in the Kern County Fire Department. The alleged inconsistency between the decision of the Ninth Circuit in this action and the decision of the Fourth Circuit in *Hartman* therefore results from distinguishable facts rather than from differing interpretations of the Constitution, the Act, and the regulations. Accordingly, there is no conflict between the decisions of the circuit courts of appeal requiring resolution by this Court.

The county has thus failed to cite any judicial or legislative authority whatever in support of its contention that the "bona fide executive employee" exemption of the Fair Labor Standards Act is to be applied more expansively to state and local government employees than to federal and private sector employees. Its request to this Court for review and decision of that issue should therefore be denied.

CONCLUSION

Petitioner Kern County is plainly unable to support its contention that the law since *Garcia* has been "inconsistent, in turmoil, and uncertain." Although there have been instances in which the courts have been required to decide whether state and local governments have improperly determined that some of their employees fall within the exemptions from the Act, the courts have also had many occasions to decide whether private sector employees were wrongfully being denied the benefits of the Act. It has been no more difficult for the courts to apply the standards for such exemptions to state and local government employees than to private sector employees.

Congress fully considered the unique nature and concerns of state and local governmental employers and thoroughly debated the matter when it extended the Act to all public employees in 1974, and again when it reaffirmed that action in 1985 after *Garcia*. The 1985 Amendments to the Act gave state and local governments time to prepare for the fiscal impact of compliance with the Act. Congress responded to the special circumstances unique to public employment with the adoption of section 7(k) (29 U.S.C. § 207(k)) in 1974 and section 7(o) (29 U.S.C. § 207(o)) in 1985. Kern County and other state and local governmental employers have thus already availed themselves of the political safeguards available to them through our representative government against any inappropriate imposition of unwarranted financial burdens from the Act. If they are dissatisfied with the legislation that resulted, they are free to return to Congress and seek further changes. They apparently believe they can obtain a better deal from this Court. It is clear, however, that coherent national policy in this realm may more readily be established by Congress than by the courts. This Court should therefore decline their request that it reconsider and reverse the decision it

rendered a mere five years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528, and deny the petition of Kern County in this action and the petition of Los Angeles County in action No. 90-927 for writs of certiorari.

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX

Letter Ruling dated January 9, 1987, of Paula V. Smith, Administrator, Wage and Hour Division, United States Department of Labor.

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness of accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator

No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

INTRODUCTION

In accordance with United States Supreme Court Rules, Rule 22, the County of Kern submits this Brief in reply to the Brief of Respondents. The County will touch on the new points attempted to be made, and will address the basic errors of the arguments of Respondents.

There are two broad areas of Respondents' argument which are errant. The first is an attempt to beguile this Court into an "all or nothing" decision. Respondents argue a reversal of the Ninth Circuit will deprive the

federal government of its power to promote a healthy economy, and eliminate FLSA protection for all public employees entirely.

The errors are obvious. This case involves only workers classified as exempt executives. Public executives do not comprise "10%" of the work force. Petitioners argue the court below made an improper interpretation of the FLSA, and do not seek to entirely negate application of the FLSA to local governments.

The second area involves characterization of the evidence, and dwelling on irrelevant material. In broad terms, the Ninth Circuit overturned the trial verdict based upon the circuit court's determination of whether Respondents met the "Salary Test" of the FLSA (29 C.F.R. §§541.1, *et seq.*). The "Duties Test" was not considered by the circuit court. Comments on the duties of Battalion Chiefs are therefore irrelevant.

Respondents similarly argue local entities have been subject to, and have implemented FLSA as to *executive* employees, wherefore the decision below yields no new burden. As appears from the record in the present matter, and appears abundantly from the several Amicus Briefs submitted, the majority of public employers have paid FLSA overtime only to rank and file employees. Public employers have relied on the exempt status of their executives for purposes of budgeting and fixing pay.

SPECIFIC ERRONEOUS ASSERTIONS

At pages 1 and 2 of their Brief, Respondents contend Kern County wishes to cut off the federal government's right to foster the economy and assure decent minimums of pay and working hours for all public employees. As

above noted, the assertion 10% of the labor force is affected is patently incorrect. This case involves only employees Kern County has classified and treated as *exempt* from FLSA. A reversal therefore would affect only public employees classified as exempt, not the entire public work force. Further, the County argues the exemption of executives under FLSA should be constitutionally applied, not that it should be abolished as to local entities.

The numerical sophistry continues at page 18 of Respondents' Brief. It is there asserted Kern County's liability is "only" about $37,000.00. Respondents admit this amount is only for a one year period, and relates only to the "routine" overtime of three hours per week, based on a $17.08 wage rate.

Suit was filed in this matter in 1986, soon after FLSA again became applicable to local employers. Therefore, the liability of Kern County extends from April 1, 1986 to the present — never mind the future effects. Four and one-half years, at about $37,000 per year indicates a liability of over $166,000, not including interest, attorney's fees or the possibility of liquidated damages.

To the amount admitted by Respondents one must add, for example, overtime for training sessions and call-back overtime for travel to and from the affected Battalion Chief's home. Respondents' implicit assumption concerning the County's liability appears ingenuous.

In attempting to denigrate the County's version of the fiscal impact, Respondents also completely ignore the impact of the ruling below on the balance of Kern County's employees. The County has about 7,000 workers, of which about 1,200 are classified as exempt under FLSA. Since none of the workers meet the "Salary Test" as the

Ninth Circuit applied it, the 28 Battalion Chiefs are only the tip of a very large iceberg indeed.

On a practical fiscal level, one must consider also the levels of compensation envisioned by the FLSA itself. One test of an executive is that he be paid at least $250.00 (29 C.F.R. §§541.1, *et seq.*) per week, or just over $6.00 per hour. Congress clearly did not contemplate bonus pay for persons making two or three times that amount, in enacting the FLSA.

The premium for overtime contained in FLSA (time and one-half) would give Battalion Chiefs an extra $8.54 per hour, or extra compensation more than double the federal minimum wage. This is a far cry from the "decent minimum" Congress sought to enforce in the FLSA.

Perhaps the most egregious positions are those taken as to the union status of Battalion Chiefs. While Battalion Chiefs are in the same union as rank and file employees, they were not "placed" there by Kern County, and their pay terms are different than for rank and file as Respondents implicitly admit, *e.g.*, that Battalion Chiefs are paid straight time for much of their "overtime" (Respondents' Brief, p. 13).

Respondents also claim the County has not availed itself of the compensatory time off ("CTO") option of FLSA. The County produced testimony that the various department heads could use either money or CTO, at their discretion, to compensate overtime. Further, use of CTO exists at every level of County employment excluding positions not covered by civil service, such as elected officials and appointed department heads.

At pages 20 and 21, Respondents contend the County did not make its legislative intent arguments at the district or circuit court levels. This has an aura of appeal,

yet ignores the alignment of the parties below. The County prevailed at trial on the merits, the district court finding Battalion Chiefs were properly classified exempt, as the FLSA has been interpreted and applied by the Department of Labor. No policy or constitutional arguments were needed.

The issues on appeal to the circuit were framed by Respondents. Their attack was primarily on the findings of the trial court, and did not focus on the issues now germane. Constitutional and public policy questions arose only by reason of the Ninth Circuit's aberrant ruling, which is under attack in the present proceeding.

Another misconception appears at pages 27 and 28, where Respondents argue no evidence of a pre-April 15, 1986 statute or ordinance precluding payment for time not worked (or covered by paid leave) was presented by the County. At trial the County's Director of Personnel, Joseph E. Drew, testified that the State Auditor considered pay for time not worked or covered by accrued paid leave was an illegal gift of public funds. Chapter 3.20 of the Kern County Ordinance Code (enacted in the 1960's), as Mr. Drew testified, sets forth the terms and conditions of public employee compensation, and includes express and exclusive provisions controlling pay to civil service employees.

Respondents, like the Ninth Circuit, consistently ignore this local ordinance. Ignoring evidence does not indicate there is no evidence. The evidence was adduced, entered, and argued.

At page 23, Respondents argue that if Congress wanted a different application of the "Salary Test," they would have said so legislatively, and that one may not infer a contrary intent from its failure to act. While this is a general principle of statutory construction, it is clear Congress has simply not considered the problem.

As quoted in the Petition and argued by various Amici, the language used in the 1974 and 1985 legislative debates and processes repeatedly refers to "nonsupervisory" public employees, and speaks of extending a guaranty of a "decent minimum" of wages and hours to local (nonsupervisory) government employees. In fact, the 1974 enactment expressly did not apply to public supervisory employees (HR 93-913, at p. 2837).

Indicative of its intent, Congress from the start left to the Department of Labor ("DOL") the task of defining the exemptions. *See* 29 U.S.C. §213(a)(1). The debates underlying both the 1974 and 1985 amendments to the FLSA uniformly refer to *nonsupervisory* public employees, and concern for the fiscal impacts of FLSA on local governments even as to rank and file employees is consistently expressed.

Contrary to Respondents' argument, while public employers have implemented FLSA for all public employees, they have since 1986 relied upon the application of the "Salary Test" made by the DOL in treating management personnel as exempt. Public executive and managerial employees have generally not been paid time and one-half.

In this regard, one of the earliest questions raised by the DOL, was whether classifications (as exempt executives) made by local civil service systems should be considered in applying the FLSA's exemption for executive employees (50 Federal Register 47696). In considering implementing rules, the DOL did not make a final rule on the "Salary Test's" (29 C.F.R. §§541.1, *et seq.*) application to public executive employees.

The DOL has still not enacted a rule as to how (or whether) the "Salary Test" will be applied to public employment. Rather, the only guidance given to public employers since 1985 came in the form of a Letter

Ruling dated January 9, 1987. The Letter Ruling states changes had been proposed, including elimination of the "Salary Test," and notes new rules regarding the test were under consideration. The Letter then concludes by stating the "Salary Test" will not be applied to deny an exemption to public employers, in civil service systems having a rule in place forbidding payment for time off not covered by paid leave time.

The DOL has not to date enacted new rules, or rescinded this Letter Ruling. Local entities have relied on the Letter Ruling in not paying time and one-half overtime to executive employees, contrary to Respondents' assertions.

In arguing there is no Congressional intent to apply the "Salary Test" to public entities differently than to private industry, Respondents ignore the express fact Congress has left to the DOL implementation and interpretation of this area of the FLSA. Since Congress deferred to the DOL, Respondents should also, and the Ninth Circuit should likewise have shown great deference to the DOL's interpretation and lack of enforcement of the "Salary Test," *Zenith Radio Corp. v. United States* (1978) 437 U.S. 443, 450.

CONCLUSION

Respondents have not addressed the profound constitutional and public policy issues raised by the Petition. They choose rather to continue to press a position which seeks only to enrich persons who are already highly paid, at taxpayer expense, for no public purpose.

Kern County does not seek to avoid a "decent minimum" for rank and file employees. Ironically, and contrary to Respondents' characterization of the County's

position, Kern County applies FLSA to its executive employees, and under the Act has determined which employees are exempt, in reliance on the interpretation of the FLSA expressed by the DOL under Congressional mandate. The Ninth Circuit (accepting Respondents' position) has departed from the proper, constitutional *application* of the FLSA's "Salary Test."

The County therefore seeks first, reasonable limitation of the *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, to preserve the reality of federalist principles contained in our Constitution, and to preserve reasonable civil service practices in the interests of public policy and accountability.

Kern County seeks reversal alternatively, as a way to spur Congress and the DOL on to fully and realistically consider how to implement FLSA in the public sector.

Respectfully submitted,

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COUNTY OF KERN

(3)

No. 90-839

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

COUNTY OF KERN, Petitioner,

v.

DAN ABSHIRE, et al., Respondents.

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY THE COUNTY OF KERN

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Related Case

The County of Los Angeles has petitioned for a writ of certiorari to your Court in County of Los Angeles v. Bratt, et al., U.S. Supreme Ct. No. 90-927 which raises issues similar to those raised by the County of Kern in this case.

Statement Under Rule 37.5

This amicus curiae brief is submitted on behalf of a political subdivision of the State of California by its authorized law officer. No consent of the parties to filing is required.

Interest of the County of Los Angeles

The County of Los Angeles is a political subdivision of the State of California. It provides a variety of local government services to approximately 8.6 million residents. For example, the County of Los Angeles gives medical and mental health care services for those who cannot otherwise obtain such services, provides police and fire protection to a large portion of our residents, and administers the local criminal justice system.

The County of Los Angeles has approximately 78,000 full time employees. An estimated 27,000 of these are classified as exempt from the time-and-one-half for overtime requirement of the federal Fair Labor Standards Act (the "FLSA"), 29 USC §207(a)(1), under the "white collar" exemptions authorized in 29 USC §213(a)(1). About 23,000 of these exemptions rest, in

part, upon the requirement that the individual employee be compensated on a salary basis. This portion of the exemption test is at issue in this case.

Under the decision of the Ninth Circuit all 23,000 exemptions are lost. For more than the past decade the compensation practices of the County of Los Angeles have not met the "salary basis" portion of the exemption test as determined by the Ninth Circuit.

The County of Los Angeles faces retrospective liability of as much as three years (statute of limitations for willful violations, 29 USC §255(a)). Conservative estimates of this liability are $170,000,000.00. This could be doubled if liquidated damages are awarded. 29 USC §216(b).

In addition the County of Los Angeles would be subject to an overtime compensation enforcement action by the federal Secretary of Labor as authorized in 29 USC §216(c), and injunctions from the federal district courts under 29 USC §217. Individual County managers may receive criminal fines or be imprisoned for willful violations of the FLSA. 29 USC §216(a).

In August, 1990 the State of California, because of lack of revenue, reduced its contributions to the County of Los Angeles by $137,000,000.00. These reductions included $81,800,000.00 for health services, $24,500,000.00 for mental health services, and $15,200,000.00 for our County trial courts.

The County of Los Angeles has closed a fire station and has commenced procedures to curtail health

services at eighteen health centers which serve the medically indigent, among others.

An additional loss of $17,000,000.00, more so a loss of $170,000,000.00, will require further reduction in essential local government services.

These losses, as well as criminal penalties, the enforcement powers of the federal Secretary of Labor, and the powers of injunction of the federal district courts, assure that the County of Los Angeles will change its compensation practices to meet the requirements of the exemption test as set out by the Ninth Circuit. The residents of Los Angeles County cannot afford the loss of 23,000 exemptions in the face of further reductions in essential services.

Argument

Direct federal regulation of local government overtime compensation practices is an unnecessary and unconstitutional exercise of the federal commerce power.

We urge your Court to grant the petition of the County of Kern and join in its request that Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985) be overruled or limited. The large scale effects of the decision of the Ninth Circuit are set forth above.

Unrestrained Congressional exercise of the federal commerce power will devour state and local government sovereignty, if such governments are treated

as just another enterprise engaged in interstate commerce. There must be constitutional boundaries on this power based on principles of federalism or the Congress, using an unlimited federal commerce power, could draw up a state budget or mandate a quadrupling of the police force in the name of protection of interstate commerce. Maryland v. Wirtz 392 U.S. 183, 204-05 (J. Douglas dissenting) (1968), overruled National League of Cities v. Usery 426 U.S. 833 (1976), overruled Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985).

The FLSA is a direct federal regulation of state and local governments as such. This case is not about the regulation of wages and hours of employees in private business. It is not about a conflict between state and federal law over the regulation of employee wages and hours in private businesses. It is about the propriety and necessity of use of the federal commerce power to directly structure employer-employee relations of state and local governments.

The FLSA is a wide ranging, pervasive, and unnecessary intrusion into the operations of state and local governments. The FLSA exemption requirements, as exemplified by the Ninth Circuit decision in this case, are broad reaching and detailed. They affect a general compensation policy of the County of Los Angeles; i.e., whether a large number of employees may lose salary for absences of less than a day.

This intrusive national regulation will cause a substantial reduction in local government services.

State law in California provides protection against the kind of public employer-employee disputes which present a danger of disrupting interstate commerce, the rationale for this particular application of the federal commerce power to the County of Kern and the County of Los Angeles.

The Meyers-Milias-Brown Act, West's Anno. Cal. Gov't. Code §§3500-3510, provides a collective bargaining system for California local governments under which public employees have the right to join organizations which will bargain with their employer on their behalf. The obligation to bargain imposed on public employers by this legislation is mandatory. The danger of a labor dispute disrupting interstate commerce is minimal.

Federal Congressional findings and policy supporting the exercise of the federal commerce power in the FLSA state that labor conditions below the minimum standard necessary for health, efficiency and well being of workers exist in industries engaged in commerce or in the production of goods for commerce. According to the federal Congress these conditions cause the spread of substandard labor conditions, burden the flow of goods in commerce, are unfair competition in commerce, lead to labor disputes burdening commerce, and interfere with the orderly and fair marketing of goods in commerce. 29 USC §202.

As local government entities the County of Kern and the County of Los Angeles operate in distinct local geographic areas performing government services. We are not private businesses directly engaged in interstate

commerce or in the production of goods for interstate commerce. We are not in competition with businesses or other government entities in other states for the performance of government services within our respective geographical boundaries. Our activities are not interstate and are not commercial.

It is the consumption of goods and services in interstate commerce and the fear that a public employer-employee dispute may interfere with such government consumerism that form the basis for application of the FLSA to state and local governments. Maryland v. Wirtz 392 U.S. 183, 194-95 (1968), overruled National League of Cities v. Usery 426 U.S. 833 (1976), overruled Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985). This "interstate consumption" rationale is insupportable. The federal Congress could use this rationale to require that a state use granite from another state in the construction of a state house. The risk of a County employee labor dispute about overtime compensation impairing consumption of interstate goods and services is minimal since the State of California provides for mandatory collective bargaining between employees and California counties under the Meyers-Milias-Brown Act.

The mere existence of a hypothetical and tenuous rational basis for application of the FLSA to state and local governments cannot be sufficient to validate this exercise of the federal commerce power.

We ask that you grant this petition, support the integrity of state and local government sovereignty and return to the principles of National League of Cities v.

Usery 426 U.S. 833 (1976), overruled Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985). As an alternative we ask that your Court grant this petition to consider what standards will serve both the interests of the federal government in regulating interstate commerce and the important role that state and local government sovereignty plays in our federal system.

Conclusion

For the foregoing reasons the petition of the County of Kern should be granted and a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(4)

No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,
Petitioner,
vs.
DAN ABSHIRE, DENNIS CARROLL, KARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SHULZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, CITY OF LOS ANGELES, CITY OF SAN DIEGO and 77 ADDITIONAL CITIES, COUNTIES AND TOWNS OF THE STATE OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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ADDITIONAL AMICI CURIAE:

CITIES: ALAMEDA, ANTIOCH, BURLINGAME, CAPITOLA, CHICO, CLEARLAKE, CLOVERDALE, DALY CITY, DEL REY OAKS, EL CERRITO, EXETER, FARMERSVILLE, FREMONT, GILROY, GLENDALE, GROVER CITY, HAYWARD, HEALDSBURG, HERCULES, HUNTINGTON, INDIO, LAFAYETTE, LINDSAY, MARINA, McFARLAND, MORGAN HILL, NAPA, NEWPORT BEACH, NOVATO, ORINDA, PACIFIC GROVE, PACIFICA, PALM DESERT, PITTSBURG, PLEASANT HILL, PORTERVILLE, REDWOOD CITY, RIVERSIDE, ROSEVILLE, SAN BUENAVENTURA, SAN LUIS OBISPO, SAN MATEO, SAN PABLO, SANTA CLARA, SANTA CRUZ, SANTA PAULA, SANTA ROSA, SEASIDE, SONOMA, SOUTH SAN FRANCISCO, SUNNYVALE, TEHACHAPI, TULARE, TUSTIN, VACAVILLE, VISALIA, WALNUT CREEK, WATERFORD, WATSONVILLE, WOODLAKE

COUNTIES: BUTTE, CONTRA COSTA, GLENN, LAKE, LASSEN, MARIN, PLACER, PLUMAS, RIVERSIDE, SACRAMENTO, SAN LUIS OBISPO, SAN MATEO, YOLO

TOWNS: FAIRFAX, MILL VALLEY, MORAGA, TIBURON

QUESTIONS PRESENTED

1. Does that portion of the "salary basis test" set forth in 29 C.F.R. § 541.118 which states that an employee cannot be considered salaried if his pay may be reduced for an absence of less than one day, and, therefore, on that basis, cannot meet the executive, administrative, or professional overtime exemption, validly apply to public sector employment?

2. Does the application of this aspect of the salary basis test to executive, administrative or professional employees of public agencies violate the Tenth Amendment by destroying the accountability of public sector managers to public agencies and the public, or by denying local governments the safeguards of the political process as contemplated in

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Garcia)?

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INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed on behalf of 518 local governments of the State of California.

Amicus League of California Cities (League) is a non-partisan, non-political organization composed of all 460 cities and towns within the State of California. The League operates through its Board of Directors and Policy Committees, which are composed of members of city councils and mayors of all cities in the State of California.

Amicus County Supervisors Association of California (CSAC) is a non-partisan, non-political organization which is composed of more than 250 County Supervisors. The members of CSAC in turn represent all 58 Counties which comprise the State of California.

Amici the City and County of San

Francisco, the City of Los Angeles, and the City of San Diego are each incorporated cities in the State of California. Los Angeles is the largest city in the State of California and the second largest city in the United States. San Diego and San Francisco are respectively the second and fourth largest cities in California. Also appearing as individual Amici are over seventy (70) California cities, towns and counties.

The Amici are responsible for providing nearly all of the local government services to the citizens of the State of California. The decision below has a dramatic and adverse fiscal impact upon Amici, on Amici's delivery of local governmental services, and upon local governmental accountability to all citizens of the State of California.

Collectively, Amici employ in excess of 500,000 employees.[1] Approximately 25 percent of these employees [125,000], have been designated by the cities or counties which employ them under the Fair Labor Standards Act's executive, administrative or professional overtime exemptions contained in 29 U.S.C. § 213(a)(1). These exempt employees include mid-level and senior managers such as chiefs of police, directors of public works, directors of social services, and directors of finance, as well as the highest administrative officials of local government such as city managers, county executives, and their management staff. The great majority of these employees earn over $50,000 per

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[1] California counties employ approximately 274,000 employees; California cities employ approximately 236,000 employees.

year. Virtually all of the local governments represented in this brief have for many years had in place rules, ordinances or regulations which require that public employees account for all working time and which limits payment of compensation for time not worked in accordance with specific paid leave policies. By virtue of the application of the rule enunciated by the Court below, all of these employees who had heretofore been considered exempt may now be entitled to hourly time and one-half overtime compensation under the Fair Labor Standards Act (FLSA or Act).

If the decision below is permitted to stand, the fiscal consequences for local government are enormous. Amici have conducted internal studies as to the potential cost for past overtime liability which may be due to executive,

administrative, and professional employees if the manner of applying the salary basis test is sustained. These past liabilities for two years are alone estimated to exceed $2 billion for California cities and counties.[2]

In addition to this fiscal impact, the decision below will adversely affect the administration of local public agencies pursuant to policies established by local legislative bodies. The rules and ordinances adopted by Amici, which require that public officials account for the time which they are absent from work go to the central core of the accountability of state and local government to

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[2] The Abshire decision has fiscal ramifications which go beyond its impact on cities and counties. The State of California employs over 60,000 employees whose exempt status may be effected by Abshire. Special districts in California (exclusive of school districts) employ 115,000 persons.

the public.

A number of the cities and counties appearing as Amici are parties to litigation in which the application of the salary basis test is pivotal to the claims of the litigants. These cases, which were filed shortly after the Abshire decision was issued, involve thousands of employees, and millions of dollars in past compensation and liquidated damages.

Pursuant to Rule 37.3, the parties have consented to the filing of this Amicus Brief. The letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Salaried executive, administrative and professional employees are expressly excluded from the provisions of the FLSA, 29 U.S.C. § 201 *et seq.*, that re-

quire time and one-half premium pay for overtime. In Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), the Ninth Circuit held that Kern County Fire Battalion Chiefs were not bona fide executive[3] exempt employees pursuant to 29 U.S.C. § 213(a)(1) because such employees' salary was subject to a potential deduction for absences from work of less than one day's duration.

Eligibility for exemption from the overtime provisions of the Act is based on both a "duties test" and a "salary test." These tests are addressed in detail in the regulations adopted by the Department of Labor (Department or

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[3] Although the Court did not specifically address the other two FLSA exemptions - the administrative and professional exemptions - the basis of the decision would extend to employees exempt from the Act pursuant to these "white-collar" exemptions as well.

DOL),[4] the agency charged with enforcing the FLSA. If an employee performs the specified types of discretionary managerial, administrative or professional duties, and is paid a salary above $250 per week, the employee is exempted from the hourly premium overtime provisions of the Act.

The Court in Abshire did not address the duties aspect of the exemptions, but focused solely on the salary test under the Department's regulations. In particular, the Court focused on two subparagraphs of one salary test regulation, which provides:

> "Deductions (from predetermined compensation) may be made ... when the employee absents himself from work for a day or more for personal reasons ... or absences of a day or more occasioned by sickness or disability ... ." 29 C.F.R. § 541.118(a)(2) and (a)(3).

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[4] See 29 C.F.R. Part 541.

Abshire held that, therefore, in order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day.

Since under County policy the salary of Kern County Fire Battalion Chiefs was subject to deductions for absences of less than one day (though such deductions had never been made), the Court held that the Battalion Chiefs were not exempt from the premium overtime provisions of the FLSA. Thus, the decision requires the County to pay retroactive premium overtime compensation to these employees for a period of two years. 29 U.S.C. § 255. The reasoning and holding of the decision applies equally to all other bona fide County managers, administrators and professional staff paid in excess of the requisite salaries.

Regulations issued by the DOL after

Congress' enactment of the "Fair Labor Standards Amendments of 1985"[5] did not address the exemptions. However, in a January 9, 1987, Administrative Letter Ruling, the DOL indicated that changes in 29 C.F.R. Part 541,[6] including that aspect of the salary test considered in Abshire, have been under consideration, and thus, the Department was taking a nonenforcement position with respect to that aspect of the salary basis test for otherwise bona fide exempt executive, administrative and professional

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[5] Enacted in response to this Court's decision in Garcia, applying the Act generally to the public sector.

[6] 29 C.F.R. Part 541 was first enacted in 1949, long before the FLSA ever became applicable to the public sector. In enacting these regulations, the DOL, therefore, had no occasion to consider the unique aspects of public sector employment, including government's accountability to the public it serves.

employees employed by public entities.[7]

Although not an affirmative interpretation, the Administrative Letter Ruling is a strong indication of DOL's intention to amend the salary test.

The "Fair Labor Standards Amendments of 1985" and the DOL's regulations adopted thereafter recognized distinctions in labor standards between the public and private sector. Kern County's contention, shared by Amici, is that application of this aspect of the salary test--which was originally enacted for and uniquely applicable to private sector employment--cannot, consistent with Congressional intent and in conformance with Constitutional standards, be made applicable to state and

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[7] This Administrative Letter Ruling is set out at pp. 21-22 *infra*.

local government employment.

REASONS FOR GRANTING A WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, FOR VACATING THE DECISION OF THE NINTH CIRCUIT

This litigation is one of numerous cases currently pending in the lower courts which presents the question of whether this aspect of the "salary basis test" set forth in the Code of Federal Regulations must be strictly complied with in order for executive, administrative and professional employees of public agencies to qualify to be exempt from the premium pay overtime provisions of the FLSA. The Ninth Circuit's decision is the first appellate ruling which has concluded that this aspect of the salary basis test is properly applied to public sector employment, thereby precluding overtime exemption of public sector managers.

In summary, the reasons why a writ should issue, or that the decision of the Ninth Circuit should be vacated, are these:

1. The decision in Abshire is erroneous because the Court rejected the DOL's administrative application of the statute, the DOL being the agency charged with enforcing the Act. DOL's application of the exemption, i.e. that this aspect of the salary basis test is not to be applied to public employees, is a valid administrative interpretation of the FLSA. The Ninth Circuit's unjustified departure from this application of the exemption exceeds the limits of judicial authority established by the Court in Garcia;

2. Application of this aspect of the salary basis test to public employees who perform bona fide executive, profes-

sional or administrative duties is inconsistent with the intent of Congress;

3. This Court's decision in Garcia indicated that there were as yet undefined limits imposed by the Tenth Amendment upon Congressional actions which may unduly burden the states. Application of this aspect of the salary basis test to otherwise bona fide executive, professional and administrative employees involves a direct impairment of the sovereignty of local governments. Public entities and the public they serve are entitled to determine the degree to which they can expect accountability from their public officials. Application of the salary basis test will inherently impair that accountability.

4. Certiorari should be granted because of the importance of the issues

to public employees, public agencies and the public at large. Billions of dollars are potentially at stake. There are numerous cases pending in the lower federal courts which involve the application of this aspect of the salary basis test to public employees. There are inconsistencies and conflicts among the lower federal courts in their treatment of this aspect of the salary basis test to public sector employees. Intervention by this Court through issuance of a writ of certiorari will promote judicial economy and bring an early, definitive ruling.

ARGUMENT

I. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES EMPLOYED BY PUBLIC ENTITIES IS INCONSISTENT WITH THE REGULATORY POLICY AND HISTORY OF THE FLSA

The Act exempts from its overtime and minimum wage provisions "any employee employed in a bona fide executive, administrative or professional capacity." See 29 U.S.C. § 213(a)(1). The Act contains no further definition of who is deemed an executive, administrative or professional employee. As relevant to executive, administrative or professional employees, the statute has remained unchanged since its enactment. See 29 U.S.C. § 213, Historical Note.

The Secretary of Labor is expressly authorized to "define and delimit" these exempt categories. 29 U.S.C. § 213(a)(1). Left with little congres-

sional guidance, the DOL adopted regulations in 1949 which first defined the so-called salary basis test for determining which employees would come within the executive, administrative and professional exemption.

Central to an understanding of the error below is that these regulations were adopted at a time the FLSA did not cover public employers; indeed, years before the FLSA was ever amended to cover the public sector employment situation.

Consequently, the Secretary of Labor, in discharging his statutory obligation to define the exemption, could not and did not take into account the critical differences which exist in employment conditions between the public and private sectors. The regulations could only have been intended to cover private

sector employment. The concept of governmental accountability in response to "the people's right to know," as reflected in such laws as public records acts,[8] is, of course, uniquely applicable to public sector employment. Furthermore, the direct relationship that commonly exists in private employment whereby managerial, administrative and professional employees are traditionally paid on a salary basis and other employees are paid on an hourly basis simply does not exist in the public sector. This inapplicability of the salary basis test to public employment is borne out by the subsequent regulatory history of the salary basis test.

The Garcia decision became final in

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[8] For example, the California Public Records Act, Government Code § 6250 *et seq.*

April 1985. In November 1985, the DOL published an advance notice of proposed rulemaking concerning 29 C.F.R. Part 541. Among the numerous questions which the Department posed was a request for comments with respect to whether local civil service system classifications should apply in determining exempt status under 29 U.S.C. § 213. See 50 Fed.Reg. 47696-01 (1987).

On January 16, 1987, the Department published its final rules for application of the FLSA to employees of state and local governments with respect to 29 C.F.R. Part 553. See 52 Fed.Reg. 2012-01 (1987). These regulations in part addressed certain of the issues raised by the 1986 amendments to the FLSA. DOL did not, however, issue regulations pertaining to the executive, administrative, and professional exemption.

It noted that it had received several comments that the salary basis test contained in 29 C.F.R. Part 541 should be modified to permit public agencies to make deductions from an exempt employee's salary for absences of less than a day in deference to local governmental policies mandating such accountability by all levels of public employees. The DOL indicated that since proposed rulemaking was then in progress, that it "would not be appropriate for the Department to address this issue in developing a final rule for Part 553." 52 Fed.Reg. 2012-01, p. 39.

The DOL has not as yet issued new regulations concerning 29 C.F.R. Part 541. Instead, it adopted a nonenforcement policy with respect to the salary basis test as it applied to executive, administrative and professional

employees employed by public entities.

The DOL issued an Administrative Letter Ruling on January 9, 1987. It states:

> "It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.
>
> "Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the

Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 47696). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less that (sic) a day, or to eliminate the salary test entirely.

"While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

"This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave."

The Ninth Circuit's disregard of the DOL's Administrative Letter Ruling departs from the regulatory history of the Act and Congressional intent.

The DOL has a statutory obligation to define the scope of exemptions under 29 U.S.C. § 213. An administrative interpretation of a statute by its enforcing agency, here the DOL, is entitled to great deference. Griggs v. Duke Power, 401 U.S. 424, 433-434 (1971). Further, the interpretation need not itself be reduced to regulation form. The interpretation need only be enunciated and reasonable in its application. Federal Deposit Insurance Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 438-440 (1986). Indeed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it

is wrong. Miller v. Youakim, 440 U.S. 125, 144 (1979).

The DOL, having set forth its interpretation of the salary basis test as applied to public agencies, cannot be lightly disregarded. It is manifest that the salary basis test, which was first described in regulations adopted in 1949, was intended and indeed could have only been intended for the private sector employment situation. Great deference is to be accorded to the DOL in its interpretation of its own regulations. Zenith Radio Corp. v. United States, 437 U.S. 443, 450-451 (1978).

The Abshire decision also conflicts with the policy adopted by this Court that the standards of enforcement of the FLSA by DOL and enforcement in private actions should not be at variance. Skidmore vs. Swift & Co., (1944) 323

U.S. 134. There the Court stated:

> "The Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (Emphasis added.) *Id.* at 139, 140.

There is no reason for the variance between enforcement of rights by private litigants (such as the Plaintiffs in Abshire) and enforcement by DOL, which results from the Abshire decision.

The DOL's policy of not enforcing this aspect of the salary basis test with respect to public sector employees is wholly consistent with the Congressional intent of the FLSA. The

Act expressly exempts bona fide executive, administrative and professional employees. Furthermore, the principal Congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working conditions, "labor conditions that are detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well being of workers." 29 U.S.C. § 202(a). See also Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728, 739 (1981). This Congressional policy is not ill served if hourly premium overtime compensation is denied to public agency managers, most of whom earn salaries of over $50,000 per year, and, in a number of cases, over $100,000

per year.[9]

The decision below also fails to give appropriate deference to the administrative interpretation of the DOL because it misapplies the Administrative Letter Ruling. The Ruling stated that the non-enforcement policy would be followed where the public employer could show that provisions contained in the applicable state or local law in effect prior to April 15, 1986, prohibited payments to an employee for absences of less than one day for personal reasons or because of illness or accident which are not covered by available paid leave. The

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[9] For example, in Amici City and County of San Francisco, employees designated as exempt earn salaries ranging from $28,000 to over $100,000 annually. Their average annual salary is approximately $55,000. The City of Los Angeles employs some 3,000 employees which are exempt, most of whom earn over $55,000 per year.

Ninth Circuit failed to give appropriate deference to the interpretation of DOL because the Ninth Circuit focused exclusively, and erroneously, on only one aspect of State law, i.e., the prohibition on gifts of public funds contained in the California Constitution. See Abshire at p. 489. However, the Ninth Circuit failed to consider the existence of local ordinances or regulations which fit within the standard established by DOL. Virtually all Amici have adopted provisions by charter, local ordinance or regulation, whereby public employees of the respective agency shall not be compensated for absences of less than a day when not covered by available leave time.

II. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES IN THE PUBLIC SECTOR IS INCONSISTENT WITH CONGRESSIONAL INTENT

Application of this aspect of the salary basis test to executive, administrative and professional employees of local government is inconsistent with Congressional intent for several reasons. First, the legislation itself expressly exempts executive, administrative and professional employees, and the holding in Abshire would to a substantial extent frustrate such Congressional intent. Second, the Congressional intent which underlies the FLSA is the removal of the social evils associated with oppressive and inhuman working conditions--a legislative intent clearly not at issue with respect to highly compensated managerial and professional

personnel. Third, testimony before the Congress and statements from the committee reports indicate that the 1974 amendments were intended to authorize application of the FLSA only to non-supervisory municipal employees. The legislative record reflects an understanding on the part of Congress that executive, administrative and professional employees of public agencies would not be the beneficiaries of the premium pay overtime provisions of the Act. Last, it is apparent from reviewing the legislative history behind the 1974 amendments that Congress did not intend that application of the FLSA to local government would have the dramatic fiscal impact which application of this aspect of the salary basis test will have upon state and local government.

A. Application of This Aspect of the Salary Basis Test Is Inconsistent with the Congressional Policy Which Underlies the 1938 Act

The Fair Labor Standards Act was enacted in 1938 while this nation remained in the throes of the most serious economic depression in its history. Low wages, long working hours and high unemployment plagued the nation. The stated purpose of the Act was to correct, and, as rapidly as practicable, to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers. See Senate Report No. 1487, Fair Labor Standards Amendments of 1966, pp. 3002-3003. The Act was designed to give specific minimum protection to individual workers and to ensure that employees other than highly compensated

managerial, supervisory and professional employees would receive "a fair day's pay for a fair day's work" and would be protected from the "evil of overwork as well as underpay." Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

Certainly exempting highly paid managerial and professional employees, such as those employed by Amici, is not inconsistent with the purposes of the Act. The majority of these employees earn well in excess of $50,000 annually.

B. Congressional History and Intent Behind the 1974 Amendments to the Act

Several aspects of the legislative history of the 1974 amendments to the Act lead to the conclusion that Congress did not intend to confer a right to premium pay overtime on otherwise exempt public agency managers. The report of

the Senate Subcommittee on Labor expressed its concerns about wholesale extension of the overtime provisions of the FLSA to public employees. Senate Report No. 93-300, pp. 502-504, 600-601.

The House Report on the 1974 amendments to the Act clearly show a Congressional intent that supervisory employees were not intended to be the beneficiaries of the Act's provisions. Thus, the House Report states:

> "The bill extends the minimum wage and overtime coverage to about 5,000,000 non-supervisory employees in the public sector not now covered by the Act ... the bill will provide that virtually all non-supervisory government employees will be covered." House Report No. 93-913 at p. 2837.

The House Report commented extensively on Department studies concerning overtime in the public sector. Significantly, these DOL studies focused on <u>non-supervisory</u> employees employed in

state and local governments. The House Report quoted extensively from this Department report which was focused on non-supervisory man-hours worked in state and local governments. The DOL's report indicates that only 2.3 of non-supervisory employee man-hours in state and local government exceeded 40 hours. The Department report, upon which the Congress relied, went on to conclude that the "actual impact on state and local governments of a 40-hour standard will be virtually non-existent." See House Report No. 93-913, pp. 2837-2838.

III. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES OF PUBLIC AGENCIES VIOLATES THE TENTH AMENDMENT

In Garcia, this Court did not rule out judicial review of Congressional action which might impinge on state sovereignty under the Tenth Amendment.

The Court left open for future clarification consideration of circumstances wherein the political process resulted in legislation which impinged on state sovereignty. As the Court stated:

> "The political process ensures that laws that unduly burden the states will not be promulgated. In the factual setting of these cases, the internal safeguards of the political process have performed as intended. These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause." 469 U.S. at 556.

The Garcia decision spawned a flood of commentaries in the legal journals. Several of these noted that the Court's decision in Garcia did not foreclose subsequent judicial review if the borders of the Tenth Amendment were crossed

by application of a federal law.[10] Amici respectfully submit that application of this aspect of the salary test crosses the borders of state sovereignty established by the Tenth Amendment.

Local agencies represented by Amici have traditionally required all of its employees, including its most senior executive staff, to account for all time intended to be compensated by their salary. It is this accountability to the agency, and to the public it serves, which is central to the Amici's argument that application of this aspect of the salary test crosses the border of the

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[10] See e.g. Lipner, Imposing Federal Business on Officers of the State: What the Tenth Amendment Might Mean, 57 George Washington Law Review 907 (1989); Van Alstyne, The Second Death of Federalism, 83 Mich. Law Review 1709, 1722-1725 (1985); Barrante, States Rights and Personal Freedom: Breathing Life into the Tenth Amendment, 63 Connecticut Bar Journal 262 (1989).

Tenth Amendment's limitations on intrusions into state sovereignty. Such application of the salary test would prohibit state and local government from enacting policies that define the degree of control they are legislatively entitled to exercise over their managerial and professional staff.

It was perhaps this very concern which prompted the dissenters in Garcia to state:

> "By usurping functions traditionally performed by the states, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the states and the federal government, a balance designed to protect our fundamental liberties." 469 U.S. at 572.

The Tenth Amendment by its terms speaks not only of rights reserved to the states, but rights reserved to the people. Certainly, this accountability is fundamental to the operation of local

government and to the people it serves.

IV. APPLICATION OF THE SALARY TEST WOULD IMPAIR OPERATION OF THE POLITICAL PROCESS AND THEREBY DEFEAT THE VIEW OF THE CONSTITUTION ESPOUSED BY THE COURT IN GARCIA

In Garcia, this Court stated:

> "But the principal and basic limit on the federal commerce power is that inherent in all congressional action - the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the state will not be promulgated. In the factual setting of this case, the internal safe-guards of the political process have performed as intended." *Id.* at 556.

Here, if the aspect of the salary test in issue is permitted to be applied to public employees when the regulatory process has not as yet run its course, the political process will not "have performed as intended." It is the DOL which has the authority to implement and administer the exemption provisions of

the Act. If the decision below is permitted to stand, then the political process, and the view of federalism espoused by the Court in Garcia, will itself have been frustrated. It is the regulatory mechanism, a part of the political process in which the states and their political subdivisions may participate, which should be permitted to define how the FLSA will be applied and implemented. The decision below is at odds with this aspect of Garcia. For this reason alone, the decision below should be vacated or a writ of certiorari should issue.

V. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANCE OF THIS CASE

A. This Issue Effects Hundreds of Thousands of Public Employees and Hundreds of Public Agencies

A vast majority of the 518 counties and cities represented by Amici have

local laws, policies or regulations providing for deductions in pay for absences of less than one day under specified circumstances. Thus, each employee classified as exempt has the potential to receive retroactive premium overtime compensation for a period of at least two years plus an equal amount of liquidated damages plus interest and attorneys' fees based on the outcome of this decision. In addition, the policies of public agencies for governmental accountability to the public will be impaired by the Federal Government. Given the broad ranging significance of this case, and its impact on local government and on public employees, certiorari should be granted.[11]

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[11] Patterson v. Lamb, 329 U.S. 539 (1947).

B. **The Fiscal Impact of This Decision on Public Agencies is Enormous**

The fiscal consequences of the decision below on the public agencies represented by Amici are enormous. As indicated, supra, internal studies conducted by Amici as to the potential cost of past overtime liability indicate that as to California cities and counties alone, the cost would exceed $2 billion. These financial implications should be given substantial weight, and, therefore, certiorari should be granted.[12]

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[12] See United States v. Mitchell, 463 U.S. 206, 211 n.7 (1983); Commissioner of Internal Revenue v. Standard Life & Accident Insurance Company, 433 U.S. 148, 151 n.5 (1977); American Can Co. v. Territory of Alaska, 358 U.S. 224 (1959) (certiorari granted in view of the fiscal importance of the question to Alaska).

C. Lower Federal Court Decisions Addressing the "Salary Test" Have Been Inconsistent and in Conflict

Since this Court's decision in Garcia, supra, the issue as to whether deductions in a salaried employee's salary for absences of less than a day defeats the administrative or executive exemption has been the subject of numerous federal district court decisions. Federal district court decisions have been inconsistent so as to leave the law, as it applies in the public sector, in a state of confusion.[13]

The inconsistency in the federal district courts, and the numerous lawsuits which are currently pending, counsel for an early resolution and clarification of this issue by the Court.

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[13] See Appendix A for listed cases.

D. There Are Numerous Cases Pending in Lower Federal Courts Which Involve Disputes Over Application of the "Salary Test"

The issue as to whether certain public employees are paid on a "salary basis," as that term is defined in 29 C.F.R. § 541.118(a), where deductions are made from employees' salary for absences of less than a day's duration, is the subject of numerous federal district court cases which are currently pending.[14] The conflicts in the federal courts and the numerous cases which are pending point to the wisdom of granting certiorari.[15]

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[14] See Appendix B for listed cases.

[15] Laing v. United States, 423 U.S. 161, 167 (1976); United States v. Standard Oil, 332 U.S. 301, 302 n.2 (1947); United States v. Powell, 330 U.S. 238 (1947).

CONCLUSION

It is respectfully requested that a Writ of Certiorari be granted, or in the alternative the decision below be vacated, because that decision:

* Is contrary to that of the administrative agency designated by law to implement the Act, and

* Is contrary to Congressional intent, and

* Is contrary to the dictates of the Tenth Amendment of the Constitution, and

* Has enormously significant fiscal and policy impact on state and local government.

Granting a writ will bring an early, definitive ruling to an issue which has been the source of conflicting decisions and considerable litigation in the lower courts.

Dated: December 26, 1990

Respectfully submitted,

By _____
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By _____
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Peter J. Brown

APPENDIX A

APPENDIX A

See Sarver v. City of Roanoke, Virginia, 29 Wage & Hour Cas. (BNA) 1442 (W.D.Va. 1990); Wright v. City of Jackson, Mississippi, 727 F.Supp. 1520 (S.D. 1989); D'Camera v. District of Columbia, 722 F.Supp. 799 (D.D.C. 1989); Wilks v. District of Columbia, 721 F.Supp. 1383 (D.D.C. 1989); International Association of Firefighters, Alexandria Local 2141 v. City of Alexandria, Virginia, 720 F.Supp. 1230 (E.D.Va. 1989); York v. City of Wichita Falls, Texas, 727 F. Supp. 1076 (N.D. Tex. (1989); Wilson v. City of Charlotte, 717 F.Supp. 408 (W.D.N.C. 1989); Harris v. District of Columbia, 709 F.Supp. 238 (D.D.C. 1989); Hawks v. City of Newport News, Virginia, 707 F.Supp. 212 (E.D.Va. 1988); Banks v. City of North Little Rock, 708 F.Supp. 1023 (E.D.Ark. 1988); District of Columbia Nurses Association v. District of Columbia, 29 Wage & Hour Cas. (BNA) 868 (D.C.D.C. 1988); Knecht v. City of Redwood City, 683 F.Supp. 1307 (N.D.Cal. 1987).

APPENDIX B

APPENDIX B

James Stewart et al. v. City and County of San Francisco, C-90-3206-Cal, N.D.CA, (This case is a class action with a class size of potentially 4400 employees); Paul Edgington et al. v. City of Reno, CV-N-90-583-ECR, D.C. Nev.; Benjamin Fletcher v. District of Columbia, 90-2949 D.D.C.; Shepard et al. v. State of California [California Department of Forestry and Fire Protection], CIVS-90-221-LKK--EM, E.D.Cal.; Phillips et al. v. State of California, CIVS-90-167 LKK--EM, E.D.Cal.; Nadeau et al. v. State of California, Department of Justice, CIVS-89-0119-LKK--EM, E.D.Cal.; Alex et al. v. State of California, California Department of Forestry and Fire Protection, CIVS-89-0032-LKK--EM, E.D.Cal.; Jerline Baker et al.v. District of Columbia, 89-2050, D.D.C.; Dennis Abrams et al. v. County of Los Angeles, CV-88-6982 HLH C.D.CA.

AMICUS CURIAE

BRIEF

No. _____

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the so-called "salary basis" test set forth in 29 C.F.R. §541.118(a), which states that when an employee's pay may be reduced for absences of less than one day that employee is not truly salaried and, therefore, cannot meet the bona fide executive, administrative, or professional employee exemption constitute an unconstitutional application of the Fair Labor Standards Act (FLSA) to public employers?

2. Have the protections of the political process, which constitutes the basis for the rationale set forth in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), failed to function, thereby undermining state sovereignty because Congress did not address the salary test issue and the Department of Labor (DOL) has avoided addressing the issue?

3. Should there be a return to the traditional versus non-traditional governmental functional analysis abandoned under *Garcia v. SAMTA* in order to prevent federal regulation of essential governmental functions usurping states' rights under the Tenth Amendment?

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ARGUMENTS

I. THE 1974 AMENDMENTS TO THE FLSA, AS MADE APPLICABLE TO THE STATES AFTER *GARCIA v. SAMTA*, HAVE AN ENORMOUS ADVERSE ECONOMIC EFFECT ON THE STATE OF CALIFORNIA AND ITS POLITICAL SUBDIVISIONS SO AS TO EFFECTIVELY DENY THE PROPER FUNCTIONING OF STATE GOVERNMENT.

In *Abshire, et al. v. County of Kern* 908 F.2d 483 (1990) the Ninth Circuit concluded that plaintiffs were covered by the FLSA because their pay was subject to deduction for absences of less than one day. The FLSA provides that bona fide executive, administrative, or professional employees are exempt from the Act. (29 U.S.C. §213(a)(1).) Congress left it to the DOL to develop the criteria for the application of these exemptions. (29 U.S.C., § 213.) At the time DOL adopted regulations for this purpose, the Act was applicable only to the private sector. In addition to establishing a duties test for each exemption, DOL also required that for any exemption to apply an employee must meet a salary test. (29 C.F.R. §§541.1, 541.2, 541.3.) The *Abshire* decision held that plaintiffs were not salaried and hence were not exempt. In applying 29 C.F.R. §541.118(a) (the salary basis test) literally, the Court found it irrelevant that no deductions had actually been made to plaintiffs' pay.

This literal application of the salary basis test to civil service employees of the State of California is devastating. California, like most public employers, views itself as accountable to the taxpayer and therefore generally

prohibits payment for hours not worked. This unremarkable similarity between California's salary regulations and practices and the County of Kern's salary regulations and practices means that most State employees will be deemed hourly employees and hence covered by the FLSA, under the rationale of the *Abshire* decision, should it remain undisturbed. This is not mere speculation: the State of California is currently litigating four FLSA cases brought by groups of consenting plaintiffs in which the "salary basis" test is central to plaintiffs' claims.

The first, *Nadeau, et al. v. State of California, Department of Justice,* CIVS-89-0119-LKK – EM, concerns 278 special agents of the State of California, Department of Justice. In a partial summary judgment dated May 7, 1990, the trial court concluded that plaintiffs were not salaried employees since their salaries were subject to reduction for absences of less than a day. The Court also concluded that liquidated damages were appropriate. The state faces a trial on the issue of whether the liability period should be extended another year. Although this decision preceded the Ninth Circuit's decision in *Abshire,* as will be seen, the *Abshire* decision preordains a similar conclusion in the other pending cases. The State's exposure in the *Nadeau* case alone is approximately 4.2 million dollars not including the possibility of an extended liability period.

The State is also a defendant in *Alex, et al. v. State of California, California Department of Forestry and Fire Protection,* CIVS-89-0032-LKK – EM. On December 17, 1990, the Court, citing *Abshire,* granted partial summary judgment to plaintiffs on issues of liability and liquidated damages on the grounds that the plaintiffs, 32 Fire Prevention

Officers, are not paid on a salary basis because their pay is subject to reduction for absences of less than one day. Thus, regardless of their duties, they have been deemed covered by the FLSA. The potential liability is large because like many fire prevention personnel, they have duty weeks in excess of 40 hours during the fire season.

The State is currently a defendant in *Shepard, et al. v. State of California (California Department of Forestry and Fire Protection)* CIVS-90-221-LKK – EM. This case involves 250 Forest Rangers who, under the holding in *Abshire* will be found covered by the FLSA, regardless of their actual duties.

Finally, but not least of all, the State is currently defending itself in *Phillips, et al. v. State of California* CIVS-90-167-LKK – EM. This case seeks to gather many remaining State employees (approximately 35,000) who may have a claim under the FLSA based on the assertion that they are not compensated on a salary basis. Currently, over 2,000 employees have consented to join in this action. It is impossible to estimate the potential liability in this case since the number of consenters is not fixed at this point in time, they work for a variety of different state departments, and their overtime experiences are highly individual. Liability will undoubtedly exceed that of the other cases.

Of the 180,000 civil service employees in California, approximately 35,000 employees who have been considered exempt from the FLSA by the State of California are the focus of these lawsuits. The State may also be vulnerable with respect to another 25,000 employees considered exempt, although to date there are no lawsuits filed with

respect to this group. The State is, thus, liable for many millions of dollars in unpaid overtime and liquidated damages, as well as prospective future costs whenever overtime is necessary to carry out vital State functions. In addition, State monies remitted to localities will in part be used to cover increased local costs as a result of *Abshire*. This liability attaches under *Abshire* because of the mere potential that such employees can have their pay reduced and would apply even though actual instances of such reductions are rare or nonexistent. The application of the salary basis test to the State of California is, thus, of great magnitude and budget-breaking consequence. Given the State's current projected deficit of one billion dollars in Fiscal Year 90-91 and approximated deficit of six billion dollars in Fiscal Year 91-92, the cost of applying the salary basis test exacerbates an already bleak financial crisis.

II. THE DEPARTMENT OF LABOR HAS BEEN IRRESPONSIBLE AND MISLEADING WITH RESPECT TO THE APPLICATION OF 29 C.F.R. §541.118(a) TO PUBLIC JURISDICTIONS. AS A CONSEQUENCE PUBLIC JURISDICTIONS HAVE HAD NO OPPORTUNITY TO RESOLVE THEIR CONCERNS THROUGH THE POLITICAL PROCESS.

A. LEGISLATIVE HISTORY

Following the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 479 U.S. 528 (1985), Congress enacted amendments to the FLSA which temporarily delayed the implementation of the FLSA on state and local governments. (Weekly compilation of Presidential documents, Nov. 18, 1985; Fall, 21, No. 46 pp.

1390-1391.) During the one year while implementation was delayed, Congress sought to amend the FLSA to make it more suitable for application to the public sector. After joint conference, the measure passed as Public Law 99-150.

B. REGULATORY HISTORY

On November 19, 1985, after the *Garcia* decision, the DOL published in the Federal Register advance notice of proposed rulemaking concerning 29 C.F.R. Part 541. (50 FR 47696). The DOL posed a number of questions focusing on the salary test as used in the administrative, executive, and professional exemptions. (50 FR 47696-47697). In particular, DOL asked:

> Should the department recognize individual state and local government civil service systems for classifying EPA (executive, professional, and administrative) employees in applying the exemption to employees of such governments?

This and other questions posed by the Department would provide a forum for discussion of the appropriateness of applying the salary test to public jurisdictions.

As a result of the *Garcia* decision, attention naturally focused on application of the FLSA to hitherto exempt public functions. The Congressional hearings preceding passage of P.L. 99-150 explored the financial consequences of *Garcia*, but nowhere was the issue of the application of 29 C.F.R. §541.118(a) discussed or even presented.

DOL took no action on its advance notice of proposed rulemaking regarding 29 C.F.R. §541 but rather,

prior to acting on these proposals, published in the Federal Register its final rule regarding 29 C.F.R. part 553 – "Application of the Fair Labor Standards Act to Employees of State and Local Governments; Final Rule." At 52 FR 2019, DOL noted:

> Finally, several commentators requested various forms of special treatment for state and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 C.F.R. part 541 that such employees be paid on a salary basis.
>
> The commentators argued that state and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as state and local governmental laws which preclude the payment of wages for hours not worked (except by earned leave).
>
> On November 19, 1985, the DOL published in the Federal Register (50 Fed.Reg. 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 C.F.R. part 541. The comment period ended on March 22, 1986. However, the department expects to publish a notice of proposed rulemaking concerning part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.
>
> In light of the separate rulemaking process with respect to part 541, it would not be appropriate for the department to address this issue in developing the final rule for part 553.

Thus, in finalizing rules pertaining to state and local governments, DOL was put on notice of objections to the salary basis test. However, it deferred action to the pending consideration of amendments to 29 C.F.R. §541. Inexcusably, DOL has not reconsidered 29 C.F.R. §541 and contrary to its express indication, did not publish a notice of proposed rulemaking concerning section 541 during 1987, or any time since. Thus, the department has never acted formally to permit consideration of alternatives to the salary basis test for state and local governments.

By denying public jurisdictions an opportunity to comment on regulations which affect them, DOL has effectively circumvented the notice and comment provisions of 5 U.S.C. §553. Thus, a fundamental safeguard of the federal rulemaking system has been denied.

C. THE DEPARTMENT OF LABOR'S NON-ENFORCEMENT POLICY.

To compound the problem, DOL issued an unnumbered letter ruling on January 9, 1987, stating in effect that while the department was considering revisions to the provision of 29 C.F.R. §541, including the salary test, "a non-enforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees." The letter ruling went on to say that the non-enforcement policy would be followed only where the public employer could show that provisions contained in the applicable state law in effect prior to April 15, 1986, prohibited payments to an employee for absences of less than one day for personal reasons or because of illness or accident which are not covered by

available paid leave. The letter ruling made it clear that "this non-enforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA."

The DOL obviously recognizes the inappropriateness of the salary basis test when applied to state and local government employees. However, while DOL will not itself prosecute and will not act to change the test, enforcement is, nevertheless, left to private citizens who frequently seek liquidated damages in excess of those sought by the department itself in areas where it chooses to litigate. The oppressive paradox to government is that when private enforcement occurs, it is more expensive to the governmental employer even though DOL's own policy has suggested that application of the salary test to the public sector is not appropriate.

It is, therefore, apparent that the political process (the approved avenue of recourse discussed in *Garcia* for ensuring that laws and regulations implementing such laws do not unduly burden the states) has utterly failed to function responsibly. It is time to revisit the serious issues raised in *Garcia* in light of the fact the regulatory process operates slowly and imperfectly while public jurisdictions are exposed to enormous liability and forced to focus their limited energies and economic resources on compliance pending political resolution.

III. APPLICATION OF THE FLSA TO ESSENTIAL PUBLIC SERVICES NOT IN COMPETITION WITH THE PUBLIC SECTOR SUCH AS FIRE-FIGHTING UNDULY INTERFERES WITH THE STATE'S SOVEREIGN FUNCTIONS

The State of California believes, for its part, that the proper balance of state versus federal power was carried

out under the rationale set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and its companion case, *State of California v. Brennan*, (October Term, 1974, Case 74-879), in which the Court found the FLSA to be inapplicable to state and local government employees as the amendments to the FLSA displaced the freedom of states to structure integral operations in areas of traditional governmental functions including firefighting.

The doctrine of federalism embodied in the Tenth Amendment to the United States Constitution is one intended to assure that local concerns will be administered, superintended, and regulated by the states as those are the governmental affairs with which the people are "more familiar and minutely conversant." (The Federalist, No. 46, p. 316.) As the dissent noted in *Garcia*, it is precisely in the true areas of traditional governmental functions that the paramount interest of state and local accountability is disserved by federal intervention under the guise of the Commerce Clause (*Garcia v. SAMTA*, 469 U.S. at 572 (POWELL, J., dissenting)).

Certainly, no areas of local concern can be better articulated than functions not carried out at all in the private sector, such as the local firefighting efforts at issue in *Abshire*, and state firefighting and drug enforcement functions at issue in California's current FLSA litigation described above.[1] An impact of the magnitude of

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[1] Similarly, in the case of *Bratt, et al. v. County of Los Angeles*, 912 F.2d 1066 (1990), the Ninth Circuit, finding itself compelled to act under the *Garcia* rationale, decided that probation and child protection activities at the county level were

(Continued on following page)

the FLSA's provisions, especially when states such as California are in an era of financial crisis for the foreseeable future, does much to undermine the quality and contained cost of such vital services. In this manner, the FLSA's effect is too significant an infringement on governmental aspects of state sovereignty to survive constitutional muster under a Tenth Amendment analysis. There simply are no demonstrably greater federal interests at stake here which would legitimately override state and local governments' rights to see to their own most efficacious providing of services.

(Continued from previous page)

subject to the provisions of the FLSA. These services are likewise unique to being carried out by governmental entities. Los Angeles County has filed a petition for writ of certiorari with your Court. The State of California believes that the writ should also be granted for the reasons set forth therein.

CONCLUSION

The State of California respectfully prays that a Writ of Certiorari be granted. The literal application of 29 C.F.R. §541.118(a) to County of Kern and by extension the State of California is both economically devastating and wrong.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 90-839

DEC 27 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF KERN,

Petitioner,

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND13 OF ITS STATE AFFILIATES, AS AMICI CURIAE IN SUPPORT OF THI PETITION FOR CERTIORARI

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INTERESTS OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The *Amici* hereinafter described file this Brief because of their ongoing concern with one of the issues presented herein:

Whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) should be overruled.[1]

Garcia eliminated the Tenth Amendment immunity of state, county and local governments (hereinafter the "States"), previously outlined in *National League of Cities v. Usery*, 426 U.S. 833 (1976), from overreaching federal legislation enacted under the Commerce Power. In the process, it authorized for the first time full-scale application of the minimum wage and overtime requirements of the federal Fair Labor Standards Act, as Amended, 29 U.S.C. § 201 *et seq.* (1989) ("FLSA") to the States. *Amici* are all organizations whose members are responsible for developing and implementing employment and labor relations policies, including those pertaining to FLSA requirements, in public jurisdictions at all levels of state, county and local government nationwide. Since *Garcia*, *Amici* and their respective member jurisdictions have experienced severe erosion of their sovereign right to structure employer-employee relationships, to determine what government services are to be provided to their citizens, and to determine how those services are to be provided.

The National Public Employer Labor Relations Association (NPELRA) is a national organization composed of more than 2,400 members who are predominantly full-time city, county, and state government professionals charged with the responsibility for implementing employment and labor relations policies affecting over four million public employees. NPELRA members reside in all 50 states and are employed by jurisdictions with as few as 25 employees and as many as 200,000-plus employees. These include New York City, the City of Chicago and the State of California.

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[1] The *Amici* generally support the position of Petitioner County of Kern.

The 13 state affiliates of NPELRA[2] are separately incorporated organizations whose members are also NPELRA members or are eligible for NPELRA membership. The state affiliates' members likewise are management and labor relations professionals at all levels of state, county, and local government. Whereas the focus of NPELRA is national in scope, the focus of the state affiliates is on issues germane to their respective jurisdictions as well as on national issues.

Written consent of all parties to the filing of this Brief has been obtained, and said consents are on file with the Clerk of this Court. Pursuant to Rule 29 of the Rules of this Court, *Amici* note further that 28 U.S.C § 2403(a) may be applicable.

REASONS FOR GRANTING THE PETITION

I. *GARCIA* SHOULD BE OVERRULED BECAUSE IT UNCONSTITUTIONALLY VITIATES TENTH AMENDMENT IMMUNITY AND MAKES THE NON-JUDICIAL BRANCHES OF THE FEDERAL GOVERNMENT THE FINAL ARBITERS OF INTERGOVERNMENTAL IMMUNITY DISPUTES

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the FLSA could not constitutionally be applied to the States pursuant to the federal government's Commerce Power, because to do so would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," in violation of the Tenth Amendment. *Id.* at 852. Consistent with a long line of prior and

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[2] California Public Employer Labor Relations Association, Connecticut Public Employer Labor Relations Association, Florida Public Employer Labor Relations Association, Illinois Public Employer Labor Relations Association, Iowa Public Employer Labor Relations Association, Minnesota Public Employer Labor Relations Association, Missouri Public Employer Labor Relations Association, New York State Public Employer Labor Relations Association, Ohio Public Employer Labor Relations Association, Oregon Public Employer Labor Relations Association, Rocky Mountain Public Employer Labor Relations Association, Washington Council of Public Personnel Administrators and Wisconsin Public Employer Labor Relations Association.

subsequent decisions,[3] the Court recognized that the States as States occupy a unique status in the constitutional scheme and are not necessarily subject to federal regulation in the same way that private entities are. More specificallly, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *National League of Cities*, 426 U.S. at 845. In cases of alleged conflict between federal regulation pursuant to the Commerce Power and state autonomy, the Court performed a balancing analysis to determine whether state or federal interests would prevail. *Id.* at 856 (Blackmun, J., concurring). *See also EEOC v. Wyoming*, 460 U.S. 226, 239 (1983); *Hodel*, 452 U.S. at 287-288.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court overruled *National League of Cities*, *id.* at 557, in a way which all but eliminates considerations of state sovereignty in determining the constitutionality of federal enactments regulating state and local government activities. Under *Garcia*, the only Tenth Amendment limits on Congress' authority to regulate state activities are structural or procedural, not substantive. *Id.* at 554. *See also South Carolina v. Baker*, 485 U.S. 505, 512 (1988). In other words, ". . . States must find their protection from congressional regulation through the

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[3] *See, e.g., Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 (1982) and *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 288 (1981) (key inquiry is "whether the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions"); *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975) (Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system"); *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (federalism means a system in which national government exercises power in ways that "will not unduly interfere with the legitimate activities of the states"), *Lane County v. Oregon*, 74 Wall. 71, 76 (1868) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized"). *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) ("As far as the Constitution is concerned, a State should not be equated with any private litigant.") (O'Connor, J. dissenting).

national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker, id., citing Garcia,* 469 U.S. at 537-554.

Not only is this a hollow protection in its own right, but the Court has virtually abdicated its role as the final arbiter of constitutional questions concerning the rights of state governments in our federal system. The Court made clear in *Baker* that neither *Garcia* nor the Tenth Amendment authorizes courts to "second-guess" the substantive basis for federal legislation. In order to establish a Tenth Amendment violation under *Garcia,* therefore, a State would have to show that the national political *process* operated in a "defective manner," *i.e.,* that the State was "deprived of . . . [a] right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513. In short, as long as the State sends legislators to Congress, and the federal enactment in question has general application to the States, it is not subject to constitutional scrutiny by the Court.

This *Garcia* test leaves virtually no role for the Court, much less one to consider state autonomy in reviewing the federal government's exercise of its enumerated powers. *Id.* at 533-34 (O'Connor, J., dissenting); *Garcia,* 469 U.S. at 567 and n.12 (Powell, J., dissenting) *and* 469 U.S. at 588 (O'Connor, J., dissenting). But since the States' role in our federal system is itself a constitutional question, the Court cannot constitutionally delegate either to Congress or to the Executive the role of policing the constitutionality of their own enactments. *Marchetti v. U.S.,* 390 U.S. 39, 58 (1968); *State Bd. of Insurance v. Todd Shipyard Corp.,* 370 U.S. 451, 456-57 (1962). *See also EEOC v. Boeing Co.,* 843 F.2d 1213, 1217 (9th Cir.), *cert. denied,* 488 U.S. 889 (1988). That role is itself reserved by the Constitution to the federal courts. *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

The Court's retreat in *Garcia* from its mandated judicial role is reason enough to reconsider and overrule *Garcia.* A return to the *National League of Cities* doctrine — in which the court must play a role in striking the proper balance between state

sovereignty and federal power — is in order. The Court should grant the writ of certiorari herein to permit reconsideration of *Garcia* at the earliest possible date.

II. *GARCIA* SHOULD BE OVERRULED BECAUSE IMPOSITION OF THE FLSA MINIMUM WAGE AND OVERTIME REQUIREMENTS HAVE IN FACT UNCONSTITUTIONALLY DIMINISHED THE SOVEREIGN RIGHTS OF STATE, COUNTY AND LOCAL GOVERNMENTS

Even *Garcia* acknowledges that the States must retain some measure of sovereign authority under our federal system. *Garcia,* 469 U.S. at 549. State sovereignty is self-governance, *i.e.,* "having the power to make decisions and to set policy." *FERC v. Mississippi,* 456 U.S. 742, 761 (1982). At least until *Garcia,* it was acknowledged that employment decisions, including those pertaining to compensation and hours of work for government employees, were the very types of decisions that epitomized the exercise of state autonomy. *EEOC v. Wyoming,* 460 U.S. 226, 238, n.11 (1983); *National League of Cities,* 426 U.S. at 845 (1976). *See also Abood v. Detroit Bd. of Education,* 431 U.S. 209, 228 (1977) (decisions of public employers are necessarily political decisions).

In *National League of Cities,* Justice Rehnquist predicted that imposition of FLSA requirements on the States would severely diminish the sovereign rights of state, county and municipal governments, by forcing a "relinquishment of important governmental activities," displacing state policies regarding how to structure delivery of required government services, and penalizing states "for choosing to hire governmental employees on terms different from those which Congress has sought to impose." 426 U.S. at 847, 849. In the wake of *Garcia,* the predicted erosion of state sovereignty has been dramatic, a testament to the "tyranny of small decisions" that with time can obliterate substantial rights. *See* L. Tribe, *American Constitutional Law* 302 (1978); *FERC v. Mississippi,* 456 U.S. 742, 774-75 (Powell, J., concurring in part and dissenting in part).

Since the late 1980's (*i.e.*, since *Garcia*), the States have been under ever-increasing pressure to deliver more services, more efficiently, with fewer revenue dollars, and without raising taxes. Reports are legion of the decaying infrastructures of our major cites and counties. State, county and municipal governments are under constant pressure to keep up with technological advances in the delivery of public health care services, police and fire protection services, and sanitation services. They are under constant pressure to at least maintain, if not improve, existing service levels in all service areas. They are under constant pressure to expand welfare services to cope with old and new social ills, *e.g.*, the reported increases of homeless persons all over the country.

In this same period of the late 1980's and early 1990's, federal subsidies to the states and their political subdivisions have been on a steady decline. One tax accountability referendum after another has appeared on the ballot in state and local elections. Politcial pressures have increased to hold the line on taxes at all levels of government. This has placed additional financial pressures on state and municipal entities in view of their declining federal revenues.

The superimposition of FLSA minimum wage and overtime requirements has severely restricted the options available to state governments and their political subdivisions to set policy, particularly against the foregoing background. In short, compliance with the FLSA has severely diminished their discretion to select, structure and prioritize delivery of government services. On the effective date of the FLSA requirements in April, 1986, the majority of state, county, and municipal governments around the country were automatically faced with significant cost increases simply to deliver the same level of services they had been providing prior to that date. One reason is that many goverment departments, fire departments in particular, employed shift schedules which exceeded the FLSA's statutory maximum for hours that could be worked without incurring time and one-half overtime pay obligations. International City Management Assn., *The Municipal Yearbook 1988* 139 (1988).

The city of Phoenix, Arizona[4] reports, for example, that FLSA overtime requirements resulting from its 56-hour weekly work schedule accounted for more than $1M per annum in increased wage costs in the Fire Department alone. The City of Yonkers, New York[5] similarly reports that it has incurred additional costs of $.5M per annum in statutorily required overtime payments in its Police Department. Fullerton, California,[6] with a population of approximately 112,000, reports that the FLSA resulted in immediate payroll cost increases of up to $200,000 per annum in its 85-person Fire Department. This was approximately 4.5% of its total payroll cost in the Department. And the three hospitals run by the State University of New York[7] report that collectively they incurred $405,000 in "new" overtime costs per annum directly as a result of the FLSA.

FLSA requirements have been directly responsible for additional *types* of cost increases. The instant case is a prime example. If the lower court's reading of the FLSA's "salary basis" test is permitted to stand, highly-paid supervisors in the County of Kern fire service will now be subject to FLSA overtime requirements, at a cost to the County of several hundred thousand dollars per annum.

Amici's members repeatedly cite other examples. Under the FLSA, various common functions that were either previously uncompensated or compensated through use of compensatory time, now must be counted, and therefore compensated, as "hours worked" within the meaning of the FLSA. Prior to 1986, employees called out on emergencies usually were compensated from the time they reached their work site and commenced work; under the FLSA, these employees must be compensated starting

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[4] The City of Phoenix as a member of Amicus Rocky Mountain Public Employer Labor Relations Association.

[5] The City of Yonkers is a member of Amicus New York State Public Employer Labor Relations Association.

[6] Fullerton, California is a member of Amicus California Public Employer Labor Relations Association.

[7] One such hospital, the Health Science Center at Syracuse, New York is a member of Amicus New York State Public Employer Labor Relations Association.

from when they leave home. Those hours, in turn, count toward reaching the weekly maximum after which time and one-half premiums must be paid. In Phoenix, this change alone has increased payroll costs by an additional $60,000 per annum.

Police canine units perform myriad functions in fighting drug-related crimes, in kidnapping cases, and in locating all types of criminal suspects. Police officers in canine units traditionally have cared for their dogs at home to facilitate bonding between dog and handler. Under the FLSA, time spent caring for such dogs at home is in many cases compensable "hours worked." Again, these additional hours worked are not only direct costs, but further increase overtime costs by increasing the speed with which employees surpass the "overtime threshold." The City of Newburgh, New York[8] reports that the FLSA-induced overtime costs attributable to its canine police unit are forcing a determination whether to continue the unit at all. Other New York municipalities are considering the same choice.

FLSA requirements have also resulted in substantial ancillary costs. The FLSA requires that premium payments, *e.g.*, hourly bonuses paid for working undesirable shifts, be counted in computing the *rate* at which time and one-half overtime payments must be paid. These calculations represent a change from prior practice in many jurisdictions, which often compensated overtime at straight time and/or at the base rate. This change has cost Phoenix, Arizona an additional $450,000 per annum above the costs previously described, directly as a result of FLSA application to the States. Fullerton, California has incurred up to an additional $10,000 per annum simply to comply with FLSA record-keeping and payroll processing requirements in its 85-person Fire Department. The City of Phoenix expends up to $150,000 per annum for this purpose.

These very substantial additional costs, directly attributable to FLSA requirements, are restrictive of state sovereignty in their own right. Money required by federal law to be spent to comply with federal minimum wage and overtime requirements cannot be spent to repair roads or open a shelter for homeless families.

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[8] Newburgh, New York is a member of Amicus New York State Public Employer Labor Relations Association.

It cannot be spent to hire more police officers or to buy new equipment for a public hospital. And it cannot be used to initiate an on-the-job training program for inner-city teenagers at training wages below the statutory minimum. In order to provide those services *and* comply with FLSA requirements, the government entity either must reduce, eliminate, or restructure other services, or raise additional revenues.

The FLSA's substantive requirements further limit the discretion of state, county and local officials to structure service delivery as their citizens may desire. For example, during winter months municipalities and county governments will have truck drivers on standby to be called out to operate extra snowplows, if needed because of weather conditions. Under the FLSA, the period such drivers are on standby often must be compensated as "time worked," even though such drivers may be sitting at home watching television with their families. The costs of this federally-imposed standby rule may require the municipality to reduce or eliminate standby drivers altogether, to change crew sizes, or to manipulate shift scheduling. These decisions, in turn, can affect the amount of available service, and the speed with which it is delivered. For example, if a municipality must eliminate standby time for expense reasons, response time in snow emergencies may diminish.

Undoubtedly, even without FLSA requirements, state and local governments would continue to have difficult choices to make concerning employee compensation, manning, scheduling and hours of work. But those choices would be their own, based on political decisions controlled by their own constitutencies, not by Congress and not by federal regulators. At least until *Garcia*, those types of decisions were the very essence of recognized state sovereignty, protected by the Constitution. As Justice Rehnquist predicted, imposition of FLSA requirements on the States has forced them to abandon services, has forced them to change service delivery methods, and has penalized them for policy choices different from the federal government's. This represents a substantial and indentifiable diminution in their ability to govern their own affairs. The States' constitutional autonomy now can only be restored with the reversal of *Garcia*.

CONCLUSION

The Petition for Writ of Certiorari should be granted to reconsider and overrule *Garcia*.

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